

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

**File Ref: F2005044
Decision Ref: D0192006**

Participants:

Dieter Hans Gustav (John) Kolo
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – “police clearance” certificates relating to licensing of school bus drivers – s.26 – documents that cannot be found or do not exist.

Freedom of Information Act 1992: s. 26; Schedule 1, clause 3(1).

Working with Children (Criminal Record Checking) Act 2004

DECISION

The decision of the agency to refuse the complainant access to the requested documents under s.26 of the *Freedom of Information Act 1992* is confirmed. The agency has taken all reasonable steps to find the requested documents but they cannot be found or do not exist.

D A WOOKEY
A/INFORMATION COMMISSIONER

21 July 2006

REASONS FOR DECISION

1. This complaint arises from a decision made by the Police Force of Western Australia ('the agency') to refuse Mr Kolo ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

Background

2. In an access application dated 15 December 2004, the complainant applied to the agency, under the FOI Act, for access to documents described by the complainant as 'Police Clearances' relating to another person's employment as a school bus driver. The complainant identified that other person by name ('the third party') and he requested access to copies of all 'Police Clearances' that had been issued to the third party in the period between 1 January 2002 and 15 December 2004.
3. By letter dated 21 February 2005, the agency notified the complainant of its decision on access. The agency's decision-maker, Senior Sergeant B Pendlebury, advised the complainant that searches with the Offender Information Bureau ('the OIB') of the agency had failed to locate the requested documents and, accordingly, the agency refused the complainant access to the documents under s.26 of the FOI Act, on the ground those documents could not be found.
4. The complainant applied to the agency for internal review of the initial decision on access and, by letter dated 28 February 2005, the agency's internal review decision-maker confirmed the agency's decision to refuse the complainant access to the requested documents under s.26 of the FOI Act. Following that, on 10 March 2005, the complainant made an application for external review to the Information Commissioner.

REVIEW BY A/INFORMATION COMMISSIONER

5. Following receipt of this complaint, I required the agency to produce to me, for my examination, the FOI file relating to the complainant's access application and any other documents relevant to this matter. After examining that material, my Legal Officer (Research and Investigations) ('my officer') made some initial inquiries with the agency in relation to this complaint and sought further information from the agency about the searches initially conducted by the agency to locate the requested documents.
6. In his letter seeking external review of the agency's decision, the complainant suggested that further inquiries might be made with the nearest police station ('the police station') and with the OIB of the agency, using the third party's full name, which he supplied to my office. My officer then made further inquiries with the Officer in Charge of the police station, and with the OIB of the agency, as suggested by the complainant, in a further endeavour to locate the requested documents. Despite further searches, no documents of the kind described in the complainant's access application were located.
7. On 4 April 2005, my officer wrote to the complainant, advising him that the agency had conducted additional searches for the requested documents, without success. My

officer advised the complainant that, on the information then available to her, she was of the view that the agency had taken all reasonable steps to find the requested documents described in his access application and that she was satisfied that there was nothing then available to her to establish that the agency held the requested documents. My officer invited the complainant to withdraw his complaint or, in the alternative, to provide me with some additional information in support of his claim that the requested documents existed and that they were in the agency's possession or control.

8. In an endeavour to be of further assistance to the complainant, my officer also advised the complainant that, in making inquiries into his complaint, she had made additional inquiries with the Department of Education and Training ('the DET') and with the Department for Planning and Infrastructure ('the DPI') and that, as a result of those inquiries, it was possible that, if the requested documents existed, they may have been held by an agency other than the agency, such as the DET or the DPI. My officer advised the complainant that he may wish to make an access application to either or both of those agencies.
9. By letter dated 7 April 2005, the complainant advised my office that he had reason to believe that the requested documents existed and were in the possession of the agency. The complainant asked that the agency be required to conduct additional searches for the requested documents at the local police post ('the police post'). After receiving that request, further inquiries were made by the agency with the Officer in Charge of the police post. The Officer in Charge of that police post conducted a search of the records held there for the period between 2001 to mid April 2005, without success. The complainant was again invited to withdraw his complaint against the agency.
10. By letter dated 14 April 2005, the complainant provided my office with a copy of a letter dated 28 October 2004 which he had received from the principal of the local primary school ('the Principal'). The Principal's letter was in response to an enquiry the complainant had made to the Principal regarding the third party's eligibility to be employed as a school bus driver. Among other things, the Principal advised the complainant that the third party "...had undergone a recent Police clearance and has subsequently been cleared to take up a position as a bus driver for the ... Primary School." In the view of the complainant, the written advice provided to him by the Principal was evidence that a police clearance had been issued to the third party when the third party applied for employment as a school bus driver and, accordingly, that the requested documents existed and were in the possession of the agency.
11. By letter dated 18 April 2005, my officer wrote to the complainant advising him that, although the Principal's letter indicated that the requested documents may exist, that letter did not state that the third party had submitted an application for a police clearance to the agency or that the requested documents existed and were in the possession of the agency. My officer again advised the complainant that it was possible that, if they existed, the requested documents may have been issued by another agency, including the DET or the DPI, but that there was then insufficient information before the Information Commissioner to establish that the requested documents should exist at the agency.
12. By letter dated 9 May 2005, the complainant advised my office that, on 7 April 2005, he had applied to the DET and to the DPI for access to the documents the subject of his

access application to the agency. The complainant submitted that, contrary to the views expressed by my officer, "...by definition, a Police Clearance can only be issued by a Police agency who would have to retain the original duplicate in its files. It follows that a duplicate of the requested Police Clearance must be existant [sic] in the files of the WA Police Service. Once I will have obtained a copy of the requested Police Clearance from one of the two above-mentioned agencies, a renewed directive by your FOI Office can then be given to the Police agency to locate the duplicate of the Police Clearance, and to give me access to it."

13. With that letter, the complainant enclosed copies of, among other correspondence, a letter from himself to the Principal and the Principal's response to that letter. In his response, the Principal advised the complainant as follows:

"The information you have requested regarding [the third party's] Police clearance is not information that [the] Primary School has readily available.

The matter of Police clearances of contracted school bus drivers is one that the contractors in conjunction with the School Bus Services deal with. My understanding is that it is the duty of the contractor to ensure that their bus driver/s have undergone recent Police Clearances.

In my investigations in October 2004, I contacted the Department for Planning and Infrastructure (Licensing Services) and verified that there was no change to the status of [the third party's] Police Clearance as a result of any decision made by any court in Australia. I outlined this fact in a letter sent to you dated 28/10/04.

If you wish to pursue this matter further please contact the Department for Planning and Infrastructure (Licensing Services) for the information you requested".

14. The complainant declined to withdraw his complaint and he asked my office not to close the file in relation to his complaint until such time as the requested documents had been found and given to him by either the DET or the DPI.
15. Following receipt of that advice from the complainant, in the period between late May 2005 and mid-December 2005, two of my officers made further inquiries with the agency and with officers of the DET, the DPI and the Public Transport Authority ('the PTA') to obtain further information from each of those agencies about the administrative processes by which licences are issued to school bus drivers and to ascertain whether any of those other agencies held a document of the kind requested by the complainant in their records. Despite those further extensive inquiries by my officers, no documents of the kind requested by the complainant were located. During that period, the complainant wrote to me in respect of his complaint to me concerning a decision by DET in response to an application he had made to that agency for documents of the same kind, clarifying that what he was seeking was properly referred to as a National Police Certificate.
16. By letter dated 2 March 2006, my officer wrote to the complainant, advising him of her preliminary view of his complaint. It was my officer's view that the agency's decision to refuse him access to the requested documents pursuant to s.26 of the FOI Act was justified, as there was no evidence then available to my officer to establish that the

requested documents existed and were in the possession or control of the agency. My officer also advised the complainant, by way of observation only, that in the event that a document of the kind he requested existed at the agency (and there was then no evidence to establish that that was the case) then that kind of document would contain personal information about a person other than the complainant and it would be a document of the kind that would be exempt under clause 3(1) of Schedule 1 to the FOI Act.

17. By letter dated 21 March 2006, the complainant responded to my officer's preliminary view of his complaint. In that letter, the complainant submitted that my staff had "*...failed to investigate to the fullest extent under the provisions and powers of the FOI Act whether there are reasonable grounds to believe that the requested documents exist or should exist in the agency.*"
18. The complainant submitted that he should be allowed to become directly involved in the searches for the requested documents and he requested that I order a retired police officer (the former Officer in Charge at the police post) to appear before me for the purpose of questioning that retired police officer under oath or affirmation, because the complainant had "*...reason to believe that he has vital information as to whether the requested documents exist or should exist in the agency and where they could be found.*" The complainant also sought permission to attend formal hearings or compulsory conferences and to question the retired police officer under oath.
19. By letter dated 23 March 2006, I advised the complainant that, having reviewed the file relating to his complaint, I did not accept his assertion that my office had not sufficiently investigated this complaint; that I considered that the investigation had now gathered sufficient information to enable me to finalise this matter; and that I had no reason to believe that the former police officer he had named had information relevant to this complaint and I did not intend to require that person to appear before me to examine him or otherwise obtain information from him.
20. I informed the complainant that the question for me to decide in this complaint is whether the agency's decision to refuse him access to the requested documents under s.26 of the FOI Act, on the ground those documents either do not exist or cannot be found, is justified. I also advised the complainant that, in light of the police clearance process for school bus drivers previously explained to him in a letter from my office dated 18 July 2005 (in respect of a related complaint he had made to me concerning the DET), it is apparent to me that any document of the kind sought by the complainant, if held by the agency at all, would be held by the OIB of the agency.
21. At the conclusion of my letter, I advised the complainant that, for the reasons I had given him and for the reasons given to him in my officer's letter of 2 March 2006, I was of the view that the agency had taken all reasonable steps to locate a document of the kind requested by him but any such document either cannot be found or does not exist. Further, I agreed with my officer's observations, in respect of the application of the clause 3 exemption to any such document if it did exist, that the information contained in such a document would be *prima facie* exempt under clause 3 and nothing that the complainant had provided to date persuaded me that any of the limits on that exemption would apply and, in particular, that disclosure of such a document would, on balance, be in the public interest in this case.

22. I also advised the complainant that I would consider any further submissions he cared to make to me which were relevant to the question I am required to decide in relation to his complaint.
23. By letter dated 28 March 2006, the complainant made further submissions to me. In essence, the complainant disagreed with the advice in my letter of 23 March 2006 and he submitted that, unless I interviewed the former police officer under oath or affirmation, no meaningful determination could be made by me in respect of his complaint. The complainant also submitted that, although the requested documents had not, thus far, been located, that did not mean that the requested documents never existed or do not now exist in the agency, merely that the requested documents cannot be found. The complainant declined to withdraw his complaint.

CONSIDERATION

24. A good deal of confusion in this matter, and in the complainant's subsequent complaints concerning decisions of the DET and the PTA in respect of similar access applications made to those agencies by the complainant, appears to me to have arisen from the language used by the Principal of the primary school in his letters of 28 October 2004 and 21 April 2005, in which he referred to "police clearances" of contracted school bus drivers. It has taken considerable effort on the part of my officers to ascertain exactly what the process is for licensing school bus drivers and what is required in respect of "police clearances". Numerous inquiries have had to be made with a range of agencies including, primarily, the DET, the DPI and the PTA. Conflicting advice was provided by all of those agencies at different times, necessitating further inquiries with each of them.
25. Following that effort, my understanding is that school bus drivers require either an "F class" licence or a "B class" licence to operate a school bus. I understand that, since 1999, drivers without an "F class" licence have been required to present an Australian Federal Police clearance to the DET before they can be awarded a new bus contract. However, drivers holding an F class endorsement on their licences are 'police cleared' or screened through the DPI (formerly the Department of Transport).
26. The DPI confirmed that school bus drivers are required to obtain either an F class or a B class endorsement on their licences. An F class endorsement on a person's licence authorises the person to drive vehicles carrying fare-paying passengers, as on school buses. A police check for criminal and traffic offences is incorporated in a person's application fee for an F class licence endorsement and the DPI undertakes a police check on the applicant's behalf. That means that there is no requirement for an applicant to attend a police station and personally request a police clearance or a National Police Certificate.
27. I am advised that the DPI has access to certain information in the police database for Western Australia and its driver inquiry officers can undertake criminal and traffic offence checks on applicants via the WA Police database. All applications for special licence endorsements, such as an F class endorsement, are entered on to the DPI's licensing system, resulting in an electronic report being automatically generated. Once the DPI checks the WA database to determine whether an applicant has a criminal

and/or traffic infringement history in WA, the electronic report is sent – usually by email – to the OIB, the division of the agency which carries out a national police check on each applicant using its national database.

28. The agency advises that the DPI regularly forwards to the OIB lists of names to be checked against the National Names Index and that the OIB staff check the names and report the findings by filling them in on the lists and returning them to DPI. If a list is sent by the DPI to the OIB and returned to DPI by email, the agency would normally keep a copy in a particular electronic file. If such a list is sent and returned by facsimile, then the agency retains a copy for one month only.
29. The OIB advises the DPI of the outcome of the national check – usually by email – and, if the applicant does not have a national criminal and/or traffic infringement history, the DPI’s licensing database is updated to reflect that. If the applicant’s police check is clear, the DPI’s electronic database will be updated to read ‘NEPI – OK’. NEPI stands for ‘National Exchange of Police Information’. The DPI does not retain the emails between the DPI and the OIB, nor the electronic reports, which I understand to be in an Excel format, once its database has been updated. As I understand it, this means that the only permanent record resulting from the police screening for a school bus driver holding an F class licence would be an electronic entry on the DPI’s licensing database. There is no discrete document – such as a certificate – issued as a result of the ‘police screening’ process followed for the purposes of granting an F class licence.
30. However, I am advised by the DPI that ‘NEPI-OK’ does not mean that an applicant’s police history is clear; rather, it means that a DPI driver inquiry officer has made an assessment, based on his or her checks and inquiries with the agency, that the applicant has not committed an offence of the kind that the Director General of the DPI considers would preclude a person from holding an F class endorsement on his or her licence. If the term “police clearance” is understood to mean a lack of any police record for a person, then it is not the case that the agency provides a “police clearance”. The agency provides to the DPI information concerning an applicant’s record and the decision whether or not to grant that person a licence is made by the DPI taking that information into account. The entry in the DPI database is not, therefore, a record of a “police clearance”; it is a record of a decision made by the DPI taking into account information provided by the agency in the course of the screening process for the purpose of the licensing decision.
31. The PTA, which is responsible for the issuing of school bus contracts and for managing those contracts, advises that prospective contractors must inform the PTA whether or not their drivers have obtained F class licences. I understand that, since January 2004, school bus contractors have been required by their contracts to, among other things, ensure that each of their drivers has a National Police Certificate. Since the beginning of 2006 all new school bus drivers are required to have a police clearance for the purposes of assessment under the *Working with Children (Criminal Record Checking) Act 2004*. However, neither of those requirements applied at the time the third party would have been licensed. At that time, if a person had obtained an F class licence endorsement, the PTA was satisfied that the driver had been police screened via the DPI’s licensing process, and no additional documentation to that effect was required.

32. Obtaining a National Police Certificate is a different process altogether. According to information on the agency's website, the agency commenced issuing a National Police Certificate from February 2003. Upon application in person at a local police station, a person may obtain a National Police Certificate, which lists the person's "... *disclosable criminal history, recorded in any Australian police jurisdiction*". I understand that, when an application for a National Police Certificate is made, the agency gives the applicant the original certificate and a duplicate is not retained by the agency. The original application is retained for 12 months at the police station at which it was lodged and then destroyed. I understand that, prior to February 2003, a similar process was followed but the certificate issued was in relation to the person's history in Western Australia only, and not nationally. The applications for those certificates were retained for three months only, before being destroyed.
33. However, for the purposes of this matter, the police screening process undertaken by the DPI in respect of applications for F class licences meant that an applicant for such a licence did not require an applicant to apply to the agency for a National Police Certificate or any kind of certificate.

DOCUMENTS THAT DO NOT EXIST OR CANNOT BE FOUND

34. Section 26(1) of the FOI Act deals with the obligations of the agency in circumstances where it is unable to locate documents sought by an access applicant or where 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."*
35. I consider that, when dealing with a complaint of this nature, there are two questions that must be answered. The first question is 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 the first question is answered in the affirmative, the next question, in my view, is whether the agency has taken all reasonable steps to find those documents.
36. I do not consider that it is my function to physically search for the requested documents on behalf of a complainant. 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.

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

37. In this complaint, it appears that the primary basis for the complainant's belief that the requested documents exist or should exist and are in the possession or control of the agency is based upon the letter dated 28 October 2004, which the complainant received from the Principal of the primary school, in response to his enquiry about the third party's employment as a school bus driver and the complainant's apparent belief that a police clearance can only be issued by a police agency and that police agency would have to retain a copy in its files.
38. The complainant has been advised by my office that, as explained above, the DPI regularly forwards to the OIB lists of names to be checked against the National Names Index and that OIB staff check the names and report the findings by filling them in on the list and returning it to the DPI. The complainant has also been advised that, although copies of the electronic lists may be retained by the agency, that is not always the case and copies of lists transmitted by facsimile are retained for one month only. The agency has indicated that, as the information provided to the DPI by the agency is otherwise available to the agency at any time, it has no need to retain those documents for any length of time.
39. Accordingly, having regard to the above-mentioned information, I accept that it was not unreasonable for the complainant initially to expect that a "police clearance" document in relation to the third party would, if it existed, be held by the agency. However, on the basis of the information subsequently provided by the agency, and the information outlined above in respect of the police screening process for the licensing of school bus drivers at the relevant time, it is clear that no document of the kind sought by the complainant (that is, a National Police Certificate or any other kind of police clearance certificate) would necessarily exist in respect of a licensed school bus driver. Given the process in respect of licensing drivers, there is no reason to expect the third party to have applied for such a "clearance", and therefore no ground for expecting that such a document does, or should, exist.
40. Further, even if the police screening process described above were initiated by the DPI in respect of the third party, it is clearly not necessarily the case that the agency would still have any record of it. I accept that the agency has no need to retain the information for its purposes and is able to access it at any time should it require it for its purposes.

The searches and inquiries made by the agency

41. In this instance, the agency has undertaken searches in the OIB, at the police station and at the police post, without locating any documents of the kind requested by the complainant. As I have said, the searches conducted at the OIB included searches of the relevant electronic file and individual applications. The agency does not have any record of receiving a request from the DPI for a police check of the third party or an

application from the third party for a National Police Certificate and there is no evidence before me to establish that the requested documents, as described in the complainant's access application, exist. That does not mean that such a document never existed, merely that it either does not now exist or that it cannot be found.

CONCLUSION

42. Having reviewed the searches undertaken by the agency, and the inquiries conducted by my office in relation to this complaint, I am satisfied that all reasonable steps to find the requested documents have now been taken by the agency but that the requested documents do not exist.
