

Participants:

**Dieter Hans Gustav (John) Kolo**  
Complainant

- and -

**Department of Education and  
Training**  
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.

*Re Kolo and Police Force of Western Australia* [2006] WAICmr 19

## 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

25 July 2006

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Education and Training ('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 7 March 2005, 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 since the third party had been employed as a school bus driver for the particular primary school.
3. In support of his access application, the complainant advised the agency that the principal of the primary school ('the Principal') had advised him, in a letter dated 28 October 2004 that "*It is the school's responsibility and therefore as Principal and bus coordinator, my responsibility to ensure that all drivers of the three bus services have undergone recent and accurate Police clearances. I can assure you that [the third party] has undergone a recent Police clearance and has subsequently been cleared to take up the position as a bus driver for the ... Primary School.*" The complainant advised the agency that, in light of that advice, he assumed that a recent and accurate police clearance had been issued to the third party and that a copy of that police clearance was held on the files of the primary school, together with other police clearances issued to the third party since the third party was employed as a school bus driver.
4. By letter dated 9 May 2005, an officer of the agency advised the complainant that the information to which he was requesting access was *prima facie* exempt information under clause 3(1) of Schedule 1 to the FOI Act and that officer inquired whether the complainant wished to withdraw his access application and the application fee would be refunded to him.
5. Following a further exchange of correspondence between the complainant and the agency, by letter dated 3 June 2005, the complainant wrote to the agency complaining that he had not received a notice of decision from the agency within the 45 day permitted period prescribed by the FOI Act. The complainant therefore applied to the agency for internal review of its 'deemed' decision to refuse him access to the requested documents.
6. By letter dated 12 June 2005, the agency notified the complainant of its decision on access. The agency's decision-maker, Mr L Stephens, Principal Policy Officer, informed the complainant that he was denied access to the requested documents, on the ground that the requested documents were exempt under clause 3(1) of Schedule 1 to the FOI Act and that, in the view of the decision-maker, it would not be in the public interest for the agency to give him access to copies of the requested documents. At the conclusion of his letter, the agency's decision-maker also advised the complainant that

his application for internal review had been forwarded to the agency's internal review officer.

7. By letter dated 17 June 2005, Ms K Trimmer, Manager, Education Policy and Evaluation, the agency's internal review decision-maker, confirmed the agency's initial decision to refuse the complainant access to the requested documents on the ground that the requested documents were exempt under clause 3(1) of Schedule 1 to the FOI Act. The internal review decision-maker informed the complainant that the requested documents consisted entirely of personal details relating to the third party and that the documents would not provide any information once the exempt matter had been removed. The internal review decision-maker also informed the complainant that the third party had the right to refuse access to the third party's personal information and that the agency had received the third party's written refusal under clause 3(1).
8. Following that, by letter dated 9 June 2005, the complainant made a complaint to the Information Commissioner seeking external review of the agency's decision to refuse access.

#### **REVIEW BY A/INFORMATION COMMISSIONER**

9. Following receipt of this complaint, pursuant to my powers under ss.72 and 75 of the FOI Act, I required the agency to produce to me, for my examination, the FOI file relating to the complainant's access application and the originals of the documents to which the complainant had been refused access by the agency.
10. The original of the agency's FOI file was produced to me by the agency, as required. However, at that point in the proceedings, the agency was unable to produce to me the originals of the documents to which the complainant had been refused access by the agency, as referred to in the notices of decision given to the complainant by the agency.
11. Following further preliminary inquiries into that aspect of the matter by my office, the agency advised my office that, as a result of further searches of its records, the agency had found that it did not hold any documents of the kind requested by the complainant and, further, that the agency's decision-makers had refused the complainant access to the requested documents without seeing the requested documents, on the belief that the third party was an employee of the agency and, accordingly, in their view, the requested documents were exempt under clause 3(1) of Schedule 1 to the FOI Act. The agency offered to refund the complainant's application fee and apologised for the mistake made in relation to the matter. The agency also advised my office that it wished to amend its decision to a decision to refuse the complainant access to the requested documents, under s.26 of the FOI Act, on the ground that the requested documents did not exist or could not be found.
12. After receiving that further information from the agency, by letter dated 18 July 2005, my Legal Officer (Research and Investigations) ('my officer') wrote to the complainant and advised him of the development. My officer also provided the complainant with detailed information about the administrative processes used to 'screen' school bus drivers, which my officers had then recently obtained from

inquiries made with the Department for Planning and Infrastructure ('the DPI') and with the Public Transport Authority ('the PTA').

13. At the conclusion of that letter, my officer acknowledged that the complainant had made his complaint to me on the basis of the agency's claims that the requested documents were exempt under clause 3(1) of Schedule 1 to the FOI Act. However, my officer invited the complainant to reconsider his complaint in light of the fact that the agency had amended its decision to refuse him access to the requested documents under s.26 of the FOI Act, on the ground that the documents did not exist or could not be found, and in light of the information provided to the complainant by my office about the administrative processes used to 'screen' school bus drivers which had been obtained from the DPI and the PTA.
14. By letter dated 25 July 2005, the complainant advised me that he wished to pursue this complaint, on the ground that the statements made to him by the agency's decision-makers in their respective notices of decision clearly indicated to the complainant that the agency's decision-makers had the requested documents before them and had examined those documents before they made their decisions to refuse the complainant access to the requested documents on the ground that those documents were exempt under clause 3(1) of Schedule 1 to the FOI Act. The complainant submitted that the agency's claims should be rejected; that the agency should be directed to conduct further searches for the requested documents; and that he should be given access to the requested documents without further delay. He also clarified that the document he was seeking was properly referred to as a National Police Certificate.
15. Following that submission from the complainant, further inquiries were made with the agency's FOI decision-makers. In response to those further inquiries, both of the agency's decision-makers advised my office that, when they made their respective decisions to refuse the complainant access to the requested documents, they had neither located nor viewed the requested documents nor did they have any knowledge that the requested documents existed at the agency.
16. By letter dated 2 March 2006, my officer wrote to the complainant, advising him of her preliminary view of this complaint. My officer acknowledged the complainant's submissions that the tenor of the agency's correspondence and the statements made to the complainant by the agency's decision-makers in their notices of decision and in the agency's correspondence to the complainant in relation to his access application would, in ordinary circumstances, lead a reasonable person to reach the conclusion that the agency's decision-makers had the originals of the requested documents before them when they made their decisions and, accordingly, that the agency was in possession of the requested documents.
17. However, my officer further advised the complainant that:
  - there were no documents on the agency's FOI file which established that, when the agency consulted with the third party, in accordance with the requirements of s.32 of the FOI Act, the agency sent the third party any documents, in order to seek his views on the exempt status or otherwise of such documents;

- the agency's Screening Unit had conducted searches of that Unit's records and it was established that the Screening Unit did not hold any records of the kind requested nor were any such records held elsewhere within the agency;
  - officers of the agency's FOI Unit had not identified any documents of the kind requested and neither decision-maker had any documents of the kind requested in front of them when they made their respective decisions on access; and
  - having considered all of the information then available to her, my officer was satisfied that there were no reasonable grounds to believe that the requested documents existed at the agency.
18. The complainant was invited to reconsider his complaint and, if he wished to pursue it, to provide me with additional information or documentary evidence he may have to establish that the requested documents exist and are held by the agency. In response, the complainant declined to withdraw his complaint and he advised my office that, in his view, the investigation into his complaint was not complete because the question as to why the agency's decision-makers had decided to refuse him access to the requested documents when the documents had not been located by the agency had not been answered.
19. Subsequently, by letter dated 15 March 2006, the complainant requested my officer to immediately provide him with copies of certain documents that had been produced to me by the agency. The relevant documents were those relating to the agency's previous consultations with the third party. Those documents had been produced to me by the agency, in order to assist me to deal with this complaint. The complainant's request was refused and, by letter dated 16 March 2006, he lodged an access application with the agency, seeking access to those documents.
20. By letter dated 21 March 2006, the complainant wrote to my officer, requesting an extension of time within which to respond to her letter dated 2 March 2006, containing her preliminary view of this complaint. The complainant advised my office that he had applied to the agency for access to the documents referred to in paragraph 19 above and that, once he had been given access to those documents, he would respond to the preliminary view and provide further information and submissions in support of his complaint.
21. By letter dated 23 March 2006, I refused the complainant's request for an extension of time. I informed the complainant that, having reviewed the material on my file, I did not consider that the additional documents were necessary for him to make submissions relevant to the question I am required to decide in this complaint, which is whether the agency's decision to refuse him access to the requested documents under s.26 of the FOI Act, on the ground that those documents either do not exist or cannot be found, is justified. I further informed him that I considered that I had sufficient information before me to consider this matter.
22. I observed that the police screening process had been explained to the complainant in detail by my officer in her letter dated 18 July 2005 and that, in my view, it is clear from that explanation that there is no reason to believe that the agency should hold a document of the kind he seeks access to. I also informed the complainant that my officer had previously addressed the apparent misunderstandings arising from the terms in which the agency responded to his access application and had given him her

preliminary view in respect of this matter, and her reasons for that view. I informed the complainant that I agreed with that view.

23. At the conclusion of my letter of 23 March 2006, I informed the complainant that, for the reasons given in that letter, and in light of the explanation of the screening process previously given to him by my office, in my view there were no reasonable grounds to believe that any document of the kind he had requested existed in the agency. I advised the complainant that I would consider any further submissions he wished to make to me relevant to the question I am required to decide, provided they were received at my office by no later than 31 March 2006.
24. By letter dated 28 March 2006, the complainant made further submissions to me. In essence, the complainant disagreed with the advice set out in my letter of 23 March 2006 and repeated his request for an extension of time.
25. The complainant submitted that, unless I ordered certain officers of the agency, the third party and another named person, to appear before me to be examined under oath or affirmation, in order to ascertain whether one or more of those persons had the requested document in his or her physical possession at some point in time and where it can now be found, no meaningful determination could be made by me in respect of this complaint. The complainant sought permission to become directly involved in the search for the requested document and submitted that he had made his access application to the agency in the public interest. The complainant declined to withdraw his complaint.

## **DOCUMENTS THAT DO NOT EXIST OR CANNOT BE FOUND**

26. Section 26(1) of the FOI Act deals with the obligations of an 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.”*
27. As I have said in several of my decisions relating to the meaning and interpretation of s.26 of the FOI Act, 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 (see: *Re Williamson and Department of Health* [2004] WAICmr 21 and *Re Mallet and Edith Cowan University* [2005] WAICmr 19).

28. 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?***

29. In this complaint, the basis for the complainant's belief that the requested documents exist or should exist and are in the possession or control of the agency arises as a result of the letter dated 28 October 2004 he received from the Principal of the primary school concerned, in response to his inquiry about the third party's employment as a school bus driver and the subsequent correspondence he received from the agency's decision-makers, in which they refused him access to the requested documents on the ground they were exempt under clause 3(1) of Schedule 1 to the FOI Act.
30. Given the foregoing, it is, in my view, not surprising that the complainant has some degree of difficulty accepting the agency's claim that the requested documents do not exist when the tenor of the correspondence he received from the agency implied, in my view, that the agency was in possession of copies of the requested documents; that the requested documents had been examined by the agency's decision-makers before they made their decisions to refuse him access to the requested documents; and that the agency had sought the views of the third party about the possible disclosure of the requested documents, when no documents of the kind requested by the complainant had then been identified by the agency.
31. Accordingly, I accept that, in the circumstances of this matter, it was not unreasonable for the complainant initially to have had an expectation that a document of the kind requested would be held by the agency. However, given the explanation of the screening process for school bus drivers which my office has given the complainant and which is set out in paragraphs 25-33 of the reasons for my decision in *Re Kolo and Police Force of Western Australia* [2006] WAICmr 19 – in respect of a related complaint by the complainant – I do not consider that there are now any reasonable grounds to expect a document of the requested kind to exist in the agency.
32. Further, although it is acknowledged that the language of the agency's notice of decision gave the impression that it had documents of the requested kind, following the inquiries made by my office, I accept that neither of the decision-makers had, or had sighted, documents of the kind requested when they made their respective decisions. It seems to me that, in effect, they made their decisions in accordance with s.23(2) of the FOI Act which permits an agency to refuse access without having identified any or all of the requested documents if it is apparent, from the nature of the documents as

described in the access application, that all of the documents are exempt. It is clear to me from the inquiries made by my office that the agency's decision-makers both believed that any document of the kind described in the complainant's access application would be exempt under clause 3(1) of Schedule 1 to the FOI Act. Whether or not that belief was justified is not a question I have to decide for the purposes of this matter.

33. I accept the explanation given by the agency and its officers that no such documents had been identified or sighted by the decision-makers when the decisions were made. This has been explained to the complainant on several occasions by my office. Given the agency's explanation, and the advice about it given to the complainant by my office, I do not consider that the language used in the notices of decision any longer provides any reasonable ground to expect that documents of the kind requested exist in the agency.

### ***The searches and inquiries made by the agency***

34. As indicated at paragraph 24 of my reasons for decision in *Re Kolo and Police Force of Western Australia*, it took some considerable effort and numerous inquiries with several agencies – sometimes giving conflicting advice – to ascertain exactly what the process for screening school bus drivers was at the relevant time and what, if any, documentation should exist and in which agency it would be held if it existed. Prior to my office establishing what the process was, as set out in paragraphs 25-33 of that decision, the agency was requested by my office to undertake further searches of its records, in an endeavour to locate any documents of the kind described in the complainant's access application, without success.
35. Following searches of the records retained by the agency's Screening Unit, it was established that the agency had no records of a police clearance for the third party. The agency does not have any record of having received an application for a police certificate from the third party and, following inquiry with both of the agency's decision-makers, as I have said, it has been established that neither decision-maker had before them any documents of the kind requested, when they made their decisions on access.
36. As a result, there is no evidence before me to establish that the requested documents, as described in the complainant's access application, actually exist and are in the possession or control of the agency. Further, for the reasons given in paragraphs 31-33 above, I do not consider there to be any reasonable grounds to expect that a document of the kind requested would exist in the agency.

### **CONCLUSION**

37. 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.

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