

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

**File Ref: F2005205
Decision Ref: D0212006**

Participants:

Dieter Hans Gustav (John) Kolo
Complainant

- and -

Public Transport Authority
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

Re Kolo and Department of Education and Training [2006]WAICmr 20

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 Public Transport Authority ('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 April 2005, the complainant applied to the Department for Planning and Infrastructure ('the DPI'), 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 since the third party had been employed as a school bus driver for a particular primary school.
3. The complainant did not receive a response from the DPI and, by letter dated 8 June 2005, the complainant wrote to that agency complaining that he had not received a notice of decision in respect of his access application within the 45 day permitted period prescribed by the FOI Act. The complainant also applied to the DPI for internal review of its 'deemed' decision to refuse him access to the requested documents.
4. By letter dated 14 June 2005, the FOI Coordinator at the DPI wrote to the complainant about the matter. The FOI Coordinator apologised to the complainant for the delay in dealing with his access application and advised him that, due to an administrative error within the DPI, she had not become aware of his access application until that agency received his letter dated 8 June 2005. The FOI Coordinator further advised the complainant that the DPI did not hold the requested documents, that "*the documents relate to*" the agency and that his access application had been transferred to the agency, in accordance with s.15(1) of the FOI Act.
5. Following that, by letter dated 1 July 2005, the A/FOI Officer at the agency notified the complainant that the Executive Director, Transperth, Regional and School Bus Services, had advised that a search of the agency's records from 1 July 2003, being the date on which the agency was created, had been conducted and that those searches did not reveal any police clearance documents with respect to the third party.
6. By letter dated 18 July 2005, the complainant applied to the agency for internal review of the decision on access. In support of his application for internal review, the complainant advised the agency that he understood that "*...the PTA, School Bus Services, is responsible for the screening and employment of School Bus Drivers, and that without a Police Clearance Certificate no person can be employed as a School Bus Driver. It follows that the [third party] must have been screened by the WA Police Service, and that he was issued a Police Clearance Certificate. [The third party] would have had to produce this Certificate to the PTA when applying for the job.*"
7. By letter dated 28 February 2005, the Chief Executive Officer of the agency confirmed the agency's decision to refuse the complainant access to the requested documents. The Chief Executive Officer advised the complainant that the matter had been

discussed with the officers of the agency who had undertaken the original search for the requested documents and that those officers had undertaken an extensive search of records held within the agency where the type of information requested would be held if it existed but that no documents of the requested kind were identified. Following that, by letter dated 19 September 2005, the complainant complained to the Information Commissioner, seeking external review of the agency's decision to refuse access.

REVIEW BY A/INFORMATION COMMISSIONER

8. Although not stated in either of the agency's notices of decision, it was apparent to me that the agency had refused the complainant access to the requested documents in accordance with s.26 of the FOI Act, on the ground that all reasonable steps had been taken to find the requested documents and the agency was satisfied that the documents could not be found or did not exist. Accordingly, I required the agency to produce to me, for my examination, the FOI file relating to the complainant's access application. After examining the material on that file, my Legal Officer (Research and Investigations) ('my officer') made further inquiries with the agency and with the FOI Coordinator at the DPI in relation to this complaint.
9. Following those initial inquiries, my officers made further inquiries into this matter. Among other things, my officers met with officers of the Licensing Services Office of the DPI, in order to obtain further information from that agency about the administrative processes used by that agency in respect of the issuing of "F Class" licence endorsements, being the licence endorsement required by school bus drivers. In addition, the agency was requested to undertake further searches for the requested documents and additional information was sought from the agency about the searches initially conducted to locate the requested documents. Despite those further searches by the agency, no documents of the kind described in the complainant's access application were located.
10. On 26 April 2006, my officer wrote to the complainant, advising him of her preliminary view of this complaint. My officer advised the complainant that, on the information then available to her, it was her preliminary view that the agency had taken all reasonable steps to find the requested documents and that the agency's decision to refuse him access to the requested documents, pursuant to s.26 of the FOI Act, appeared justified. My officer invited the complainant to withdraw his complaint or, in the alternative, to provide additional information in support of his claim that the requested documents existed and that they are in the agency's possession or control.
11. By letter dated 5 May 2006, the complainant advised my office that his access application to the DPI covered the period before the agency was established in July 2003 as well as the period after the agency was established in July 2003. The complainant submitted that both the agency and the DPI were required to conduct thorough searches for the requested documents, in accordance with their respective statutory obligations under the FOI Act. The complainant submitted that, although the agency had refused him access to the requested documents under s.26 of the FOI Act, the DPI had not advised him under which section of the FOI Act that agency had refused him access to the requested documents but, rather, had merely advised him that

the requested documents were not held by the DPI and had transferred his access application to the agency under s.15(1) of the FOI Act.

12. The complainant submitted that I should direct the DPI to conduct a search of that agency's records, as the third party had commenced his employment as a school bus driver prior to 1 July 2003 and, as a result, had started employment as a school bus driver under the jurisdiction of the DPI. The complainant declined to withdraw his complaint and he submitted that a final determination could not be made in respect of this complaint until I had directed the DPI to search for the requested documents and then informed the complainant under which section of the FOI Act that agency had decided to grant or refuse him access to the requested documents.

DOCUMENTS THAT DO NOT EXIST OR CANNOT BE FOUND

13. 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.”

14. 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.
15. 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?

16. As I indicated in the reasons for my decisions in *Re Kolo and Police Force of Western Australia* [2006] WAICmr 19 and *Re Kolo and Department for Education and Training* [2006] WAICmr 20 – in respect of two other, related complaints by the complainant – some confusion in these matters appears to have been caused by the language of a letter dated 28 October 2004 to the complainant from the principal of the primary school for which the third party is a school bus driver. In that letter, the principal referred to “police clearances” of school bus drivers. I do not consider it to have been unreasonable, on the basis of that letter and a subsequent letter to the complainant from the principal, to have expected that some kind of document evidencing such “clearances” would exist.
17. Further, the DPI advised the complainant that it had, in accordance with s.15(1) of the FOI Act, transferred the complainant’s access application to the agency because the requested documents were not held by the DPI “*but relate to*” the agency. Section 15(1) requires an agency receiving an access application to transfer the application to another agency if it does not hold the requested documents but knows, or has reasonable grounds to believe, that the other agency holds the requested documents. I understand that the agency is responsible for administering the contracts for school bus services. In those circumstances, I acknowledge that it was not unreasonable for the complainant to have had an expectation that a document relating to a particular “police clearance” in relation to the issuing of a licence for the purpose of driving a school bus would, if it existed, be held by the agency.
18. However, as a result of extensive inquiries with several agencies – specifically, the Department of Education and Training, the Police Force of Western Australia, the DPI and the agency – my office established that the process for licensing school bus drivers at the relevant time, although incorporating police screening of applicants, did not require the generation of a document of the kind the complainant assumed would exist and be retained by at least one of those agencies. That process was explained to the complainant on more than one occasion by my office and is set out at paragraphs 25-33 of my reasons for decision in *Re Kolo and Police Force of Western Australia*.
19. In view of that information, which has been explained to the complainant, I do not consider that it is now reasonable to expect that a document of the kind requested by the complainant – a National Police Certificate, or any other kind of police clearance certificate in respect of the third party – exists in the agency or at all. If any record were to exist, it would be a computer entry of the kind described in paragraph 29 of my reasons for decision in *Re Kolo and Police Force of Western Australia*. However, as explained in paragraph 30 of those reasons, such a record is not a police clearance; rather it is a record of a licensing decision by the DPI taking into account information received as a result of a police screening.

The searches and inquiries made by the agency

20. In this instance, the agency has undertaken searches of its records, without locating any documents of the kind requested by the complainant. The agency does not have any record of having received an application for a police certificate from the third party and

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 above, I do not consider that there are reasonable grounds to expect that such a document exists or should exist in the agency or elsewhere.

CONCLUSION

21. Having reviewed the searches undertaken by the agency, and the inquiries conducted by my office in relation to this complaint, and in light of the process for the licensing of school bus drivers at the relevant time – as set out in paragraphs 25-33 of my reasons for decision in *Re Kolo and Police Force of Western Australia* – 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.
