

**Decision D0232014 – Published in note form only**

***Re Appleton and Department of Education [2014] WAICmr 23***

**Date of Decision: 10 December 2014**

***Freedom of Information Act 1992: section 26***

On 6 August 2013, Mr Paul Appleton (**the complainant**) applied to the Department of Education (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to particular documents held by the agency. Specifically, the complainant sought access to those documents relating to an investigation into allegations made against the complainant. In a decision dated 20 September 2013, the agency granted access to a number of documents, some of which had been edited to delete personal information about third parties. The complainant sought internal review of that decision on the basis that further documents (**the requested documents**) exist. On internal review, the agency confirmed its original decision. The complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

Following receipt of the complaint, the Commissioner obtained a copy of the full FOI file maintained by the agency in respect of the complainant's access application.

The Commissioner required the parties to attend a compulsory conciliation conference in this matter pursuant to sections 70 and 71 of the FOI Act. Following the conciliation conference, the complainant withdrew his claim for access to personal information about third parties and the agency agreed to conduct further searches for the requested documents. The parties did not agree to a resolution of the complaint at the conciliation conference and the matter was referred back to the Commissioner for formal review.

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 Commissioner considers that, 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 second, whether the requested documents 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.

The complainant submitted that the requested documents should exist in the agency. The complainant provided detailed submissions to support his claim. The agency was invited to conduct further searches based on the submissions provided by the complainant.

On 12 September 2014, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. It was the Commissioner's preliminary view that the agency's decision to refuse access to the requested documents under section 26 of the FOI Act was justified. The complainant was invited to withdraw his complaint or to provide the Commissioner with further submissions relevant to the matter for the Commissioner's determination. The complainant advised that he did not accept the Commissioner's preliminary view and made further submissions to the Commissioner.

The agency was invited to conduct further searches, which located one additional document. That document was released in full to the complainant. In addition, the details of the agency searches were provided to the complainant who maintained his dissatisfaction with the agency's decision to refuse access to documents under section 26 of the FOI Act.

Having reviewed all of the material before him, the Commissioner was not dissuaded from his preliminary view and confirmed the decision of the agency to refuse access to the requested documents under section 26 of the FOI Act, on the basis that the documents do not exist.