

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

**File Ref: F2009198
Decision Ref: D0242009**

Participants:

Michael John Guest
Complainant

- and -

Main Roads Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to resumption of land - scope of the access application - whether certain documents fall within the scope of the access application.

Freedom of Information Act 1992: sections 12, 15(1), 20, 32, 33, 65(1).

DECISION

The decision of the agency to refuse access to the additional documents described by the complainant is confirmed on the basis that those documents are outside the scope of the access application.

Sven Bluemmel
INFORMATION COMMISSIONER

15 September 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by Main Roads Western Australia ('the agency') to refuse Mr Michael Guest ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. My understanding of the background to this matter is as follows. In an access application dated 2 December 2008, the complainant applied to the agency for access to all documents relating to the land resumed by Taking Order No. H593162. Specifically the complainant sought access to the following documents ('the original scope'):

"...all file notes, letters, correspondence, all assessments, all reports or minutes of meetings of the Western Australian Planning Commission, reports, valuations, documents, plans, decisions, briefings, briefing notes, writings, memoranda, documents, electronic communications such as emails and electronically stored documents and all drafts with regard to the valuation and negotiation of and settlement of all of the following land resumed by Taking Order No. H593162 registered on 8 November 2000.

1. *Portion of Avon Location V and being part of Lot 2 on Diagram 37219 and (secondly) portion of Avon Location V now shown as Park Location 29375 on Deposited Plan 24478 and being part of Certificate of Title Volume 2197 Folio 600;*
2. *Portion of each of Avon Locations U3 and 12 and being Lot 101 on Plan 13505 now shown as Location 29385 on Deposited Plan 24478 and being part of the land contained in Certification of Title Volume 1613 Folio 426;*
3. *Portion of each of Avon Locations U3 and 12 and being Lot 102 on Plan 13505 now shown as Location 29386 on Deposited Plan 24478 and being part of the land contained in Certificate of Title Volume 1613 Folio 427;*
4. *Portion of Avon Location U3 and being part of the land on Plan 2940 and being part of the land on Plan 2940 now shown as Pt Location 29384 on Deposited Plan 24478 and being part of the land contained in Certificate of Title Volume 1681 Folio 217;*
5. *Portion of Avon Location V being part of the land on Plan 1227 now shown as Location 29376 on Deposited Plan 24478 and being part of the land contained in Certificate of Title Volume 1914 Folio 347;*
6. *Portion of Avon Location U2 now shown as Location 29382 on Deposited Plan 24478 and being part of the land contained in Deed of Conveyance Book XXVII folio 484;*
7. *Portion of Avon Location V and being part of Lot 12 on Plan 15588 now shown as Location 29378 on Deposited Plan 24478 and being part of the land contained in Certificate of Title Volume 1935 Folio 42;*
8. *Portion of Avon Location V and being Lot 10 in Plan 1588 now shown as Location 29379 on Deposited Plan 24478 and being part of the land contained in Certificate of Title Volume 2127 Folio 199; and*

9. *Portion of Toodyay Suburban Lot S19 now shown as Toodyay Lot 311 on Deposited Plan 24478 and being part of the land contained in Certificate of Title Volume 2140 folio 547.*
3. On 2 December 2008, the complainant also made an access application in identical terms to the then Department for Planning and Infrastructure ('the DPI'). In accordance with s.15(1) of the FOI Act, the DPI transferred that second access application to the agency. By letter dated 16 January 2009, the agency advised the complainant that it had received the second access application that had been transferred to it by the DPI. The agency sought an extension of time in which to deal with the complainant's access application and the complainant agreed to an extension of time to 22 February 2009.
4. In a letter dated 3 February 2009, the agency advised the complainant that it considered his access application was very broad in its terms and that under s.20 of the FOI Act the agency may decide to refuse to deal with his access application. The agency invited the complainant to reconsider the scope of his access application, and suggested a way for him to reduce the scope. According to what appears to be a contemporaneous file note on the agency's Freedom of Information ('FOI') file, the agency recorded in a telephone conversation with the complainant on 13 February 2009 that the parties had agreed to reduce the scope of the complainant's access application and limited his application to "...all settlement documents relating to the 9 properties (showing financial settlement)" ('the first revised scope'). It appears to me that the agency then proceeded to deal with the application on the basis of its understanding of the reduced scope which was recorded in the file note described above.
5. Thereafter, in accordance with its obligations under ss.32 and 33 of the FOI Act, the agency contacted the relevant third party owners of the nine properties and sought the views of those parties about disclosure of the settlement documents relating to each of their properties to the complainant. Four of the third parties consented to disclosure of settlement documents relating to their properties. Under cover of a letter dated 20 March 2009, the agency released to the complainant, in full, copies of the settlement documents relating to those four properties. The agency advised the complainant that it was awaiting a response from third parties in relation to the other five properties.
6. On 31 March 2009 the complainant contacted the agency by telephone. The agency's file note of that conversation, states: "*Michael Guest received documents. He has requested documents showing financial bargaining/correspondence between MR and 3rd parties [the second revised scope] advised him have to search files/consult 3rd parties, will contact him in a week to discuss further, if any documents are found and wht [sic] MR decision is.*"
7. In a letter dated 31 March 2009, the agency advised the complainant that it had received consent from four of the remaining third parties and it had decided to release those four additional settlement documents to him. It is my understanding, based on my examination of the agency's FOI file, that one third party did not consent to the disclosure of their personal information. However,

that party did agree to deal with the complainant directly on the issue of providing information to him. The agency also advised the complainant that it was considering whether it would deal with his request for the documents described by him in the telephone conversation of 31 March 2009.

8. In a letter dated 20 April 2009, the agency advised the complainant that it was dealing with his access application on the basis of the first revised scope and it *“was not prepared to agree to extend the agreed scope of the FOI application to further requested documents.”* The agency also advised the complainant that *“[i]t is open to [him] to make another FOI application for those documents.”*
9. In a letter dated 21 April 2009, the complainant applied to the agency for internal review of its decisions dated 20 March and 31 March 2009. The complainant claimed additional documents should exist which come within the scope of his access application. Specifically, the complainant claimed that he should have been given access to *“...valuations (of either party), documents evidencing the negotiations and agreements reached, minutes of the Executive Finance & Property Committee and reports, documents as to the reports to the Minister (if applicable) and Ministerial approval”* (‘the third revised scope’). It appears that on 21 April 2009, the complainant also telephoned the agency and discussed his application for internal review and specified the documents to which he sought access.
10. In a letter dated 29 April 2009, the complainant wrote to the agency confirming his understanding of the agreed reduced scope of his access application. The complainant advised the agency that his understanding of the agreed scope appeared to be different to the understanding of the agency as described by the agency in its letter of 20 April 2009 to the complainant. The complainant advised the agency that he had *“...agreed to narrow the scope to all those documents surrounding the settlement. Necessarily that includes all correspondence, valuation reports etc...[w]hilst I have received copies of the bare discharge documents I still await the documents **surrounding** the settlement process”* (‘the fourth revised scope’).
11. On 4 May 2009, the agency provided the complainant with its notice of internal review decision. The agency interpreted the complainant’s application for internal review as a review of its deemed decision to refuse him access to documents, on the basis that not all documents coming within the scope of his access application had been identified and provided. The agency decided that it had correctly identified all of the documents coming within the first revised scope and that it had released all of those documents to the complainant. Therefore, the agency decided that it had not refused the complainant access to any documents.
12. On 9 May 2009, the complainant applied to the Information Commissioner for external review of the agency’s decision.

REVIEW BY THE INFORMATION COMMISSIONER

13. Following receipt of this complaint, the agency was required to produce to this office the FOI file maintained by the agency in relation to the complainant's access application. My officer made further inquiries with the agency. In particular, my officer made inquiries about the agency's understanding of the scope of the complainant's access application.
14. On 23 July 2009, I wrote to the parties informing them of my preliminary view that the scope of the complainant's current access application is limited to the first revised scope, being the settlement documents relating to the nine properties. Therefore, it was my preliminary view that the agency had not refused access to any documents that come within the scope of the complainant's access application.
15. On 28 July 2009, in response to my preliminary view, the complainant confirmed he did not accept my view and made further submissions to me. The complainant submits that based on his understanding of a telephone conversation with the agency, it is clear that the scope of his access application relates to documents "around" the settlement of the affected properties. He particularised categories of documents which he considered would come within that scope. In an effort to attempt to conciliate this matter, I required the agency to produce to me a sample of the documents as specified in the complainant's letter of 28 July 2009.
16. The agency produced three files to me with the relevant documents clearly marked. I have examined those files and the marked documents. In my view, based on my cursory examination of those files, the agency's initial advice to the complainant that his application was too broad and that it may refuse to deal with it under s.20 of the FOI Act may be justified. Therefore, I have decided to finalise this complaint with a decision.

Decision under review

17. The complainant submits that the agency has refused him access to documents sought by him under the FOI Act, because it has not identified all of the documents coming within the scope of his access application.
18. Under s.65(1) of the FOI Act, a complaint may be made to the Information Commissioner on certain limited grounds. Section 65(1) provides:

"65. Complaints

(1) A complaint may be made against an agency's decision –

- (a) to give access to a document;*
- (b) to give access to an edited copy of a document;*
- (c) to refuse to deal with an access application;*
- (d) to refuse access to a document;*

- (e) *to defer the giving of access to a document;*
- (f) *to give access to a document in the manner referred to in section 28 or withhold access under that section; or*
- (g) *to impose a charge or require the payment of a deposit.”*

19. Based on the information the complainant has provided, his complaint is made under s.65(1)(d). In order to decide on that issue it is necessary to determine the scope of the access application.

The scope of the complainant’s access application

20. The terms in which an access application is framed set the parameters for an agency’s response under Part 2 of the FOI Act, and in particular, set the direction of the agency’s searches to locate all documents which may fall within the scope of the access application. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants can assist the process by describing with precision the document or documents to which they seek access. Section 12 of the FOI Act not only requires that an access application be in writing, but that it must provide enough information to enable the requested documents to be identified.
21. While s.12(1)(b) of the FOI Act obliges an applicant to provide sufficient information to enable the requested documents to be identified, s.11(3) of the FOI Act places a corresponding obligation on an agency to assist a person to make an access application that complies with s.12.
22. On receipt of the complainant’s access application, the agency considered the original scope too broad for the agency to be able to deal with it. An agency may refuse to deal with an access application under s.20 of the FOI Act, if the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations. Section 20 also places an obligation on agencies to take reasonable steps to help an access applicant change his or her access application to reduce the amount of work needed to deal with it.
23. In accordance with its obligations under s.20 of the FOI Act, the agency, in its letter dated 20 April 2009, provided the complainant with some assistance in order to reduce the scope of his access application. Based on my examination of the agency’s FOI file and what appear to be various contemporaneous file notes of telephone conversations between the complainant and the agency, it is my view that the agency attempted, based on its initial view that the scope of the complainant’s access application was too broad, to help the complainant to reduce that scope. The agency considered the scope of the complainant’s access application to be limited to the first revised scope.
24. The agency then proceeded to deal with the complainant’s access application and grant him access to all of the documents it considered come within the first revised scope. That is, the nine documents that record the settlement agreements for the properties of the third parties.

25. In my view, the agency should have set out its understanding of the first revised scope of the application in writing to the complainant so that there could be no misunderstanding. In this, I accept that a genuine misunderstanding about the scope of the complainant's access application has resulted.
26. Although I am not required to make a determination in relation to the agency's view that it could refuse to deal with the original scope of this access application under s.20 of the FOI Act, such a decision appears to be reasonable on the information currently before me.

THE COMPLAINANT'S SUBMISSION

27. In summary, the complainant submits that based on the telephone conversation of 13 February 2009 he had with the agency, the agreed scope of his access application was broader than the first revised scope.

CONSIDERATION

28. The agency's record of the telephone conversation 13 February 2009 states:

"...all settlement documents relating to the 9 properties (showing financial settlement)"

The complainant's record of the same conversation states:

"Spoke to [agency officer] Agreed to provide documentation around settlement with all land owners..."

29. Clearly there is some discrepancy in the interpretation of the telephone conversation between the parties, as recorded in the respective records above. In my view, the complainant's understanding of the "redefined" scope of his access application is essentially the same scope as his initial access application, which the agency had indicated was potentially too large for it to deal with. The facts indicate that the complainant and the agency agreed to some form of scope reduction on 13 February 2009. In my opinion it would be inconsistent to conclude that the complainant's understanding of the scope is the actual scope of the complainant's application, as this would not result in any scope reduction.

CONCLUSION

30. Given all of the above, in my opinion, the conclusion reached by the agency regarding the reduced scope of the access application was reasonable. Therefore, I find that the documents identified by the complainant in what I referred to above as the second revised scope, the third revised scope and the fourth revised scope, are outside the scope of the access application. Therefore, the agency's decision to refuse access to those documents is justified, and I confirm that decision.
