

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

**File Ref: F2008229
Decision Ref: D0382008**

Participants:

Esperance Port Authority
Complainant

- and -

**Department of the Premier and
Cabinet**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to lead export from Esperance Port Authority - documents relating decisions of former Ministers for the Environment - access refused because documents do not exist - section 26 - whether reasonable grounds to believe that documents exist or should exist - sufficiency of searches.

Freedom of Information Act 1992 (WA): section 26

DECISION

The agency's decision to refuse access to the requested documents, in accordance with section 26 of the *Freedom of Information Act 1992*, is confirmed.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

29 August 2008

REASONS FOR DECISION

1. This complaint arises from a decision by the Department of the Premier and Cabinet ('the agency') to refuse access to documents requested by the Esperance Port Authority ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In an access application dated 10 March 2008, Minter Ellison, lawyers for the complainant, applied to the then Minister for the Environment ('the Minister') for access to documents relating to Environmental Protection Authority Bulletin 996 which was issued in September 2000 by the former Minister, the Hon Cheryl Edwardes MLA; Ministerial Statement 559 which was issued in December 2004 by the then Minister, the Hon Dr Judy Edwards MLA; and various other documents relating to the Magellan Lead Carbonate Project.
3. In an email dated 13 March 2008, the Minister's Executive Officer advised the complainant that "*...documents of the former Minister...are no longer located in this office. At the end of a Minister's term all documents are returned either to the originating agency (in this case DEC formerly DoE) or in some cases to the Department of the Premier and Cabinet for archiving. As you indicated that you are not seeking documents of the current Minister,... it would therefore be appropriate to transfer your application in full to the DEC.*"
4. In response, the lawyers for the complainant advised the Minister to "*...transfer our application to the Department of Environment and Conservation. Could you also please transfer a copy of our application to the Department of Premier and Cabinet? We anticipate that there will be documents that do not originate from the Department of Environment and Conservation.*"
5. The Minister's Executive Officer advised the complainant that as requested she had transferred its application in full to the Department of Environment and Conservation ('the DEC') on 13 March 2008. In addition, the Executive Officer advised the complainant that "*[t]he information you seek should be captured from DEC files – I am checking with the Records Branch at the Department of Premier and Cabinet as I have been advised that generally they keep only the former Minister's administrative files. I do not think it would be helpful to transfer your application in its current form to DPC as well. However, if you are aware of some documents that DPC might have, it might be worthwhile sending a separate application narrowing the scope for those specific documents.*"
6. According to the agency's FOI file, a copy of the complainant's access application was received in the agency on 1 April 2008. In a telephone conversation on 14 March 2008, the agency's A/FOI Coordinator appears to have suggested to the complainant's lawyer that it may wish to wait for the DEC's decision on access before lodging an access application with the agency. In a letter dated 18 March 2008 to the agency, the lawyer acting for the

complainant referred to the telephone conversation between herself and the A/FOI Coordinator and states that “[o]ur application was transferred to you and the Department of Environment and Conservation (DEC) on 13 March 2008.”. While the complainant did request that a copy of its application be transferred to the agency, I can find no evidence to support the claim by the complainant that the access application was in fact transferred to the agency. In addition, in the same letter, the complainant’s lawyer advised the agency’s A/FOI Coordinator that the complainant had considered her proposal to wait for a decision on access from the DEC and had “a different view of the way forward.”

7. The complainant’s lawyer asserted that the agency’s proposal to await the outcome of the DEC’s decision on access was contrary to the provisions of s.4 of the FOI Act and that the agency’s proposal was in fact a refusal of access under s.26(2) of the FOI Act. The complainant’s lawyer requested a response to those issues by close of business on 20 March 2008.
8. In an email dated 20 March 2008, the agency’s A/FOI Coordinator confirmed receipt of the complainant’s letter of 18 March 2008 and advised that a response would be provided in due course, but not by 20 March 2008. In reply to that email, in an email of the same date, the complainant’s lawyers advised the agency’s FOI Coordinator that the complainant took the agency’s email of 20 March 2008 “...to mean that the [agency] will not be dealing with our application on the basis that the documents cannot be found or do not exist pursuant to section 26 of the [FOI Act]. We will be taking steps to make a complaint to the Information Commissioner.”
9. The agency’s A/FOI Coordinator responded by email dated 25 March 2008 confirming her earlier advice in her email of 20 March 2008. The complainant’s lawyer responded in an email of 26 March 2008 that the complainant now considered that the agency is dealing with its access application. The agency’s A/FOI Coordinator responded on the same date correcting the complainant’s understanding that the agency was dealing with its access application.
10. In a letter dated 1 April 2008 from the agency to the complainant’s lawyers, the agency’s A/FOI Coordinator confirmed her understanding of the substance of the telephone conversation of 14 March 2008 with the lawyer acting for the complainant and the various other communications between the agency and the complainant’s lawyers up to that date. The A/FOI Coordinator’s also confirmed that the agency would deal with the access application despite the fact that it was not transferred to the agency by the Minister and despite the fact that the complainant did not make a separate application to the agency. The agency’s A/FOI Coordinator also provided the complainant with some preliminary advice as to how the agency may need to deal with the access application.
11. In a notice of decision dated 22 April 2008, the agency refused the complainant access to the requested documents under s.26 of the FOI Act on the basis that those documents cannot be found. In a letter dated 22 May 2008, the complainant sought internal review of the agency’s decision.

12. On 12 June 2008, the agency advised the complainant that it had located two documents which it considered came within the scope of the complainant's access application and released those two documents in full to the complainant. The agency confirmed its initial decision to refuse access under s.26 of the FOI Act to the majority of documents requested by the complainant on the basis that those documents cannot be found in the possession or under the control of the agency. The agency provided the complainant with details of the searches it had undertaken to locate the requested documents.
13. Thereafter on 22 July 2008, the complainant applied for external review by the Information Commissioner.

REVIEW BY THE A/INFORMATION COMMISSIONER

14. On receipt of this complaint I obtained the agency's FOI file maintained in relation to the complainant's access application and my office asked the agency to supply further information concerning the requested documents and the searches made for those documents. The agency provided my office with the requested information.

Documents that do not exist or cannot be found

15. Section 26(1) of the FOI Act deals with the obligations of an agency in circumstances where it is unable to locate the 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.”*
16. When dealing with s.26, 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. In circumstances 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.

17. 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.

The complainant's submission

18. The complainant submits that:

- “3.1 It is to be expected that there are documents authored by the Minister, received from or directed to the Appeals Convenor, the EPA and/or the EPA Service Unit*
- 3.2 It is to be expected that there will also be the Minister's own notes and records of her deliberations, made as a result of advice received.*
- 3.3 It [sic] to be expected that there is correspondence existing between the Minister and Magellan Metals Pty Ltd. For example, [the complainant is] aware...that written advice was provided to the Minister by the EPA and/or the EPA Service Unit in relation to the Section 45C Approval.*
- 3.4 (a)...*
(b)...
(c) it is the usual practice for the files of former Minister's to be sent to DPC.
- 3.5 The Minister's Office says it is not in possession of any of the Minister's files relating to subject matter of the FOI Application.*
- 3.6 Logically, therefore, the DPC must be in possession of more documents subject of the FOI Application.*
- 3.7 The DPC did not search the archive boxes from years 2000-2003 when conducting the internal review...”*

The agency's submission

19. The agency submits that in accordance with the relevant guidelines, it is standard practice for the agency to be in possession of only those documents, of a former Minister, that are of an administrative nature. All other documents and records relating to the portfolio are returned to the relevant government department to which those records relate.
20. The agency says that it does not hold documents from the period when the Hon Cheryl Edwards was Minister for the Environment. Prior to 2005,

Ministerial offices archived or destroyed their records in accordance with Premier's Circular 39/93. That circular was rescinded on 22 June 2005.

21. On receipt of the access application, the agency's Corporate Information Branch was contacted. That branch conducted a search of its computerised database which resulted in 100 boxes being identified as holding records from the period when Judy Edwards was the Minister for the Environment. A further, more refined, search was conducted on those 100 boxes, which resulted in 11 boxes being identified as containing documents which may come within the scope of the access application.
22. The balance of 89 boxes did not contain any documents relating to the access application.
23. The searches undertaken by the agency used the keywords Magellan, Bulletin 996; 996; Ministerial Statement 559; 559; Lead; and Lead Carbonate. The refined search was undertaken also used a date range parameter. The 11 boxes identified as containing documents which may come within the scope of the access application were physically searched. No documents coming within the scope of the access application were located.
24. It is now the practice that when a Minister resigns or leaves the portfolio, that portfolio related operational files and records are returned to the agency principally assisting the Minister in the administration of the relevant portfolio. In relation to other administrative files and records, the agency's Corporate Information Branch attends at the Ministerial office and collects the administrative records which the Ministerial staff have collected and placed in appropriate storage boxes. Those boxes are stored offsite from the agency. It is those boxes which comprise the 100 boxes identified by the agency as being relevant to Judy Edwards as Minister for the Environment.
25. The agency also submits that searches were undertaken for electronic records from the former Minister's office and no relevant documents were located.

The existence of the documents

26. It seems reasonable to me that documents of the type requested by the complainant should exist, in a government agency. However, based on my inquiries, and the searches conducted by the agency, I do not consider it reasonable to expect that documents of the kind requested by the complainant should exist in the agency. I accept the agency's submission that it receives and retains administrative records from former Ministers, and that portfolio and operational records are retained by the relevant agency principally assisting the Minister in the administration of the relevant portfolio.

Has the agency now taken all reasonable steps to find the documents?

27. Section 26(1)(a) of the FOI Act requires that an agency must take "*all reasonable steps*" to find the requested documents. On the information currently before me, I consider that the agency has taken all reasonable steps to

find the requested documents. In light of the searches and inquiries which the agency has made, I do not require the agency to make further searches and inquiries at this stage.

28. Although the complainant considers that it is “*logical*” that the requested documents exist in the agency, I do not agree, based on the information currently before me. There is nothing in the information currently before me to show that they do or should exist in the agency. On the contrary, the complainant has on foot an FOI application before the DEC seeking the same documents.
29. If an agency is unable to locate requested documents, an adequate statement of reasons may go some way towards reassuring a sceptical applicant. In my view, the minimum requirement is an explanation of the steps taken by the agency to satisfy the request. The agency’s notices of decision comply with s.30 of the FOI Act by providing the complainant with details of the searches undertaken to locate the requested documents. I am satisfied in this instance that the complainant has been adequately informed of the nature and extent of the searches conducted by the agency and that those searches have been, in the circumstances, reasonable.
30. In light of the information before me, I am not satisfied that there are reasonable grounds to believe that the requested documents exist or should exist in the agency. In view of that, I do not consider that it is necessary for the agency to conduct further searches for them.

CONCLUSION

31. For the reasons stated above, I confirm the agency’s decision to refuse the complainant access to the requested documents on the ground that all reasonable efforts have been taken to find the requested documents and I am satisfied that they do not exist in the agency.
