OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2007293 Decision Ref: D0482008

Participants:

Ross William Leighton
Complainant

- and -

Shire of Kalamunda
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access – section 26 – whether reasonable grounds to believe that documents exist or should exist – sufficiency of searches.

Freedom of Information Act 1992: section 26(1), 32, 68, 70, 72, 75, 76, 84; Schedule 1, clause 3(1)

Re Oset and Ministry of the Premier and Cabinet [1994] WAICmr 14
Re Barrett and Police Force of Western Australia [1995] WAICmr 32
Re Anderson and Water Corporation [2004] WAICmr 22
Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health (1985) 8 ALD 163
Chu and Telstra Corporation Limited [2004] AATA 1127
Chu v Telstra Corporation Limited [2005] FCA 1730

DECISION

The agency's deemed refusal of access, pursuant to s.26, to the documents which the complainant claims exist or should exist is confirmed on the basis that the agency has taken all reasonable steps to locate those documents but they either do not exist or cannot be found.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

31 October 2008

REASONS FOR DECISION

1. This complaint arises from a decision of the Shire of Kalamunda ('the agency') to refuse Mr Ross William Leighton ('the complainant') access to certain documents requested by him under *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. I understand that the complainant is the registered owner of a property located at Pt Loc 707 (32) Gavour Road, Wattle Grove, Western Australia. In mid 2004, the complainant applied to the agency, asking the agency to initiate an amendment to District Town Planning Scheme No.2 to rezone the complainant's property from Rural to Special Use (Aged Persons Facility). The Council of the agency decided not to initiate the requested amendment to District Town Planning Scheme No.2.

3. On 9 May 2007, the complainant made another application to the agency, requesting the agency to initiate a scheme amendment to District Town Planning Scheme No.3 in order to rezone the complainant's property at 32 Gavour Road from Special Rural to Special Purpose – (Aged Persons Facility) ('the proposed Scheme Amendment'). I understand from the correspondence provided to me by the complainant's legal advisers, Jackson McDonald, Lawyers, during the course of these proceedings that the complainant wished to construct an aged care facility on the property.

4. On 12 June 2007, Jackson McDonald applied to the agency - on behalf of the complainant - under the FOI Act seeking access to various documents held by Councillors of the agency relating to the proposed Scheme Amendment.

5. On 9 July 2007, the Planning Services Committee of the agency considered the complainant's application for an amendment to District Town Planning Scheme No.3. The relevant officer of the agency recommended to the Planning Services Committee that the Council of the agency initiate the requested scheme amendment but the Planning Services Committee, by a majority of 7 to 4, voted against the officer's recommendation. The Planning Services Committee then resolved, again by a majority of 7 to 4, to recommend to the Council of the agency that the Council not initiate the proposed Scheme Amendment.

6. By letter dated 11 July 2007, the agency's FOI coordinator, Mr N Wilson, wrote to Jackson McDonald advising it, among other things, that it seemed likely that some of the documents described in the complainant's access application would contain personal information about third parties and, as a result, third party consultation may be required, in accordance with the requirements of section 32(2) of the FOI Act. The agency also advised Jackson McDonald that the work involved in dealing with the complainant's access application, as submitted to the agency, was likely to divert a substantial and unreasonable portion of the agency's resources away from its other operations.

7. The agency's FOI coordinator advised Jackson McDonald that the complainant would be required to reduce the scope of his access application and asked that he identify with particularity the documents described in his access application dated 12 June 2007.

8. On 16 July 2007, the Council of the agency, at an Ordinary Council Meeting, resolved, by a majority of 7 to 4, not to initiate the proposed Scheme Amendment sought by the complainant.

9. By letter dated 17 July 2007, Jackson McDonald advised the agency that the complainant had decided to reduce the scope of his access application to a request for access to documents held by a Councillor of the agency, Councillor P Tonkin, concerning the proposed Scheme Amendment. The revised scope of the complainant's access application was described by Jackson McDonald as a request for access to the following kinds of documents:

> *"1. all e-mails, faxes, letter, petitions and other documents received from, or sent to, residents or ratepayers, or the agents of residents or ratepayers, regarding a proposed Scheme Amendment for Pt Loc 707 (32) Gavour Road, Wattle Grove which have been held, received or sent by Councilor* (sic) *Tonkin;*
>
> *2. all file notes or records of phone conversations made by Councillor Tonkin as a result of phone conversations or meetings with residents or ratepayers, or the agents of residents or ratepayers, regarding a proposed Scheme Amendment for Pt Loc 707 (32) Gavour Road, Wattle Grove; and*
>
> *3. All file notes, e-mails and memos passing between Councillor Tonkin and other Councillors or sent from Councillor Tonkin to staff of the Shire, regarding a proposed Scheme Amendment for Pt Loc 707 (32) Gavour Road, Wattle Grove".*

10. Jackson McDonald further advised the agency that the complainant:

- had decided to limit the scope of his revised access application to documents dated after 1 January 2007;
- did not seek access to any correspondence exchanged between Councillors of the agency and the complainant and any agent of the complainant, including Jackson McDonald and the firm Webb and Associates, Planning Consultants; and
- had noted the agency comments about personal information about third parties and the complainant consented to being given access to edited copies of the requested documents with third party information deleted.

11. Following a further exchange of correspondence between the agency and Jackson McDonald, in relation to the complainant's access application, by letter dated 15 August 2007, the agency's FOI Co-ordinator notified Jackson McDonald of the agency's decision on access. The agency identified thirty (30) documents falling within the revised scope of the complainant's application. The agency gave the complainant access to fifteen of those documents but refused him access to the remaining fifteen documents, which were referred to

in the Schedule of Documents attached to the agency's notice of decision as Documents 3, 4, 11, 12, 14, 15, 18, 23, 24, 25, 26, 27, 28, 29 and 30. The agency claimed that Documents 3, 4, 11, 12, 14, 15, 18, 23, 24, 25, 26, 27, 28, 29 and 30 were not "documents of an agency" within the meaning of the FOI Act and, in the alternative, that those fifteen documents were all exempt documents under clause 3 (personal information) of Schedule 1 to the FOI Act.

12. By letter dated 20 August 2007, the complainant applied to the agency for internal review of the initial decision on access and, by letter dated 24 August 2007, the former Chief Executive Officer ('the former CEO') of the agency notified Jackson McDonald that he had decided to confirm the agency's initial decision to refuse the complainant access to Documents 3, 4, 11, 12, 14, 15, 18, 23, 24, 25, 26, 27, 28, 29 and 30 ('the disputed documents').

13. Following that, by letter dated 31 August 2007, Jackson McDonald applied to the former A/Information Commissioner ('the former A/Commissioner') seeking external review of the agency's decision on access. Jackson McDonald made detailed submissions to the former A/Commissioner as to the reasons why the complainant said that the disputed documents were, in the view of the complainant, "documents of an agency" within the meaning of the FOI Act and why the disclosure of the disputed documents under the FOI Act would not, in the view of the complainant, "reveal" any personal information about third parties.

REVIEW BY THE A/INFORMATION COMMISSIONER

14. Following receipt of this complaint, in accordance with the requirements of section 68 of the FOI Act, by letter dated 6 September 2007, the former A/Commissioner notified the former CEO of the agency that this complaint had been made to her and, in accordance with her authority under sections 72 and 75 of the FOI Act, the former A/Commissioner required the former CEO of the agency to produce to her, for her examination, the originals of each of the disputed documents and the FOI file maintained by the agency in relation to the complainant's access application.

15. By letter dated 12 September 2007, the agency's legal advisers, McLeods, Barristers and Solicitors, produced the disputed documents to the former A/Commissioner. McLeods advised the former A/Commissioner that:

> "*The enclosed documents have been provided to me by Councillor Tonkin on the express instruction that they were not to be provided to the Shire. She clearly does not regard them as Shire documents but that of course is an issue for decision.*"

16. By letter dated 13 September 2007, Jackson McDonald wrote to the former A/Commissioner in relation to this complaint. Jackson McDonald advised the former A/Commissioner that:

> "[O]*ur client has informed us that he has recently been made aware that there may be documents which fall within the scope of his claim but which have not been identified in the Schedule of Documents prepared by the Shire in its notice of decision of 17 August 2007.*

> *Our client has been informed that there may be at least one e-mail between Cr Pauline Tonkin and another Councillor of the Shire, Cr Nita Sadler which has not been referred to in the notice of decision. Our client is not aware of any other details which might further identify this document, however he has committed to advising you, through this firm, if he becomes aware of any other information which may enable you or the Shire to identify this or any other relevant documents.*
>
> *Accordingly, in addition to the matters raised in our complaint dated 31 August 2007, we wish to apply for a review the adequacy of the searches undertaken by the Shire in relation to the FOI application of 12 June 2007."*

Jackson McDonald did not at that point say how, when and by whom it had been made aware of the existence of other documents that it claimed are within scope of the access application.

17. On 16 October 2007, with the consent of Jackson McDonald, my Legal Officer (Research & Investigations) provided the agency with a copy of Jackson McDonald's submissions in support of the complainant's application for external review dated 31 August 2007 and invited the agency's response. By letter dated 25 October 2007, the former CEO of the agency responded. In summary, the former CEO maintained the view previously expressed by the agency that the disputed documents were not "documents of an agency" within the meaning of the FOI Act.

18. On 6 November 2007, my Legal Officer (Research & Investigations) provided Jackson McDonald with a copy of the agency's submissions of 25 October 2007 and invited the complainant to make submissions to the former A/Commissioner in response. Jackson McDonald's response was received on 14 November 2007. In essence, those submissions reasserted the complainant's view that the disputed documents were "documents of an agency" and that it was in the public interest for the disputed documents to be released under the FOI Act, in order to ensure that local government in Western Australia remained open and accountable and that Councillors are not encouraged to make decisions outside of the public view.

19. In the period between December 2007 and February 2008, my Legal Officer (Research & Investigations), undertook consultations and discussions with Jackson McDonald, with the complainant and with the agency, with the view to attempting to negotiate a conciliated resolution of this complaint.

20. By letter dated 4 March 2008, Jackson McDonald advised my office that the complainant would consider an agreed resolution, on the basis that the agency would give him access to the "substance" of the documents that fell within the scope of his access application. However, Jackson McDonald further advised my office that any such agreed outcome "*…does not resolve that aspect of complaint F2007293*" relating to the adequacy of the agency's searches for documents that fell within the scope of the complainant's access application.

21. As a result of the consultations and discussions with my office, the agency decided to give the complainant access to copies of the disputed documents. As

agreed with Jackson McDonald, and in light of the fact that the agency had identified a number of third parties by referring to various persons by name in the Schedule of Documents given to the complainant, the agency gave effect to its amended decision by reproducing the substantive text of the disputed documents in a typed form - excluding personal information about third parties (except officers of the agency), the date of the document and whether the typed version was originally an email or a letter.

22. By letter dated 21 April 2008, in accordance with an agreement negotiated between the parties, the former CEO of the agency gave Jackson McDonald access to copies of the disputed documents. The former CEO advised Jackson McDonald that although he did not accept that the disputed documents were required to be released to the complainant under the FOI Act, in the interests of openness, the documents were being released to the complainant.

23. The former CEO of the agency further advised Jackson McDonald that a number of other documents had been received from Councillor Tonkin which were dated after 12 June 2007 and which were not included in the document schedule attached to the agency's initial notice of decision dated 15 August 2007. As a result, an additional 47 documents were also released to the complainant by the agency, either in edited form or by reproducing the substantive text of the documents.

24. By letter dated 13 May 2008, Jackson McDonald advised my office that the agency had provided the complainant with access to certain documents, purportedly in accordance with the agreement negotiated between the parties. However, Jackson McDonald said that the complainant's willingness to agree to the conciliated outcome was on the basis that disclosure would be complete and in accordance with the "spirit and intent" of the FOI Act. Jackson McDonald submitted that in its view that had not occurred in this case and they said that the complainant:

> "*…is concerned that proper processes are being sidestepped in an attempt to conciliate this matter which allows the Shire to avoid its statutory obligations under the Act. Our client maintains his view that the Shire is attempting to cover up certain aspects of its decision-making, which our client considers to be faulty, and the CEO's assertions only seem to highlight our client's concerns. The FOI process in relation to these applications has done nothing but confirm our client's belief that the Shire of Kalamunda does not understand, let alone implement, open and accountable government.*"

25. Jackson McDonald drew to my attention several matters of concern to the complainant relating to this complaint. For example, several of the documents released to the complainant by the former CEO of the agency in April 2008 referred to other documents or attachments which Jackson McDonald said had not then been released to the complainant by the agency. Jackson McDonald also made further submissions to me in support of the complainant's assertion that the searches carried out by the agency in order to identify the documents falling within the revised scope of the complainant's access application had not been adequate. Jackson McDonald submitted that "[t]*he primary reason for* [their] *belief that the searches undertaken by the Shire have not revealed all*

documents falling within the scope of [the complainant's] *application…is that the Shire has not disclosed* [three] *documents falling within the scope of* [*the* complainant's] *application…of which* [the complainant] *has copies…"* and provided specific details of those three documents.

26. On behalf of the complainant, Jackson McDonald requested that I carefully review the adequacy of the searches undertaken by the agency and that I also obtain the hard drives, and access the servers used by several Councillors of the agency, including Councillor Tonkin, and that I engage an information technology expert to undertake a forensic analysis of the hard drives and servers in order to disclose whether all documents and, in particular, emails falling within the revised scope of the complainant's access application had been revealed. Jackson McDonald advised me that the complainant undertook to pay reasonable costs for the requested analysis but that he reserved his right to apply for an award of costs under section 84 of the FOI Act if the requested analysis revealed that documents had not been disclosed or withheld, as the complainant believes.

27. In light of the complainant's assertion that the agency had not identified all of the documents which fell within the revised scope of his access application and that additional documents of the requested kind may have existed at the agency, by notice in writing under section 72(1)(a) of the FOI Act, on 10 June 2008, my office required the former CEO of the agency to provide me with full and detailed information about the searches and inquiries undertaken by the agency, including at the Shire's offices, for the documents the subject of the complainant's revised access application, including details of the "key words" used in any electronic database searches; the hard copy files searched; the areas and locations searched; the names and titles of the persons who conducted the searches; and the outcome of those searches.

28. My office also required the agency to provide me with details of the searches undertaken, other than at the Shire's offices, for electronic and/or hard copy documents including, but not limited to, the computer or hard drive on which Councillor Tonkin received, sent and/or stored documents of the requested kind including searches of electronic storage locations such as 'inboxes', 'sent folders', 'deleted folders', 'archive folders' and storage devices such as flash drives, floppy discs or compact discs and details of the outcome of those searches. The required information was subsequently delivered to me by the agency on 25 June 2008.

29. In the interim, on 18 June 2008, my Legal Officer (Research & Investigations) also sought the agency's response to twelve (12) points raised by Jackson McDonald in its letter dated 13 May 2008, in relation to the documents released to the complainant by the agency. The agency's response to those matters was received on 19 June 2008.

30. Following that, by letter dated 25 July 2008, my Legal Officer (Research & Investigations) required the agency to provide me with further information in relation to the complainant's claim that certain documents were held by Councillor Tonkin that had not been identified by the agency during the process

of dealing with the access application the subject of this complaint. Councillor Tonkin subsequently contacted my office on 13 August 2008, seeking a copy of an email which the complainant claimed she had allegedly sent to former Councillor Sadler in relation to the complainant and details of the date the email was supposedly sent. My office advised Councillor Tonkin that the requested information could not be provided as the complainant's solicitors had not provided my office with that kind of information.

31. The additional information referred to in paragraph 30 was delivered to me by the agency on 14 August 2008.

32. Following my consideration of all of the additional information provided to me by the agency and by the complainant's legal advisers, on 9 September 2008, I advised the parties of my preliminary view of this complaint and my reasons for that view. In summary, it was my preliminary view that:

    - subject to the agency attending to certain minor matters and releasing edited copies of the three additional documents referred to at paragraph 25 – which had been located by a further search conducted by Councillor Tonkin - the complainant's complaint in respect of the agency's decision to refuse him access to the disputed documents has been resolved by conciliation between the parties and, accordingly, I was no longer required to decide whether or not the disputed documents were documents of an agency under the FOI Act or whether the disputed documents were exempt under clause 3 of Schedule 1 to the FOI Act, as initially claimed by the agency; and

    - the FOI issue remaining in dispute in this matter, that I was required to determine, was the complainant's assertion that the agency had not conducted "all reasonable steps" to find the documents falling within the revised scope of the complainant's access application.

33. The agency accepted my preliminary view of this complaint and on 2 October 2008, gave the complainant access to edited copies of the three documents referred to at paragraph 32, as well as two further documents, and, on 24 October 2008, attended to the minor matters referred to in my preliminary view. In addition, in the course of finalising this matter, my office identified a further three documents within the revised scope of the complainant's access application, which were amongst the documents produced by McLeods to the former A/Commissioner referred to at paragraph 15. As a result, on 15 October 2008, the agency gave the complainant access to edited copies of two of those documents and, on 24 October 2008, gave the complainant access to an edited copy of the third document.

34. My officer has made extensive inquiries with the agency and carefully reviewed the documents produced to my office by McLeods and the documents which the agency has released to the complainant. As a result, I am satisfied that all documents located by the agency and/or Councillor Tonkin falling within the revised scope of the complainant's application have been released to the complainant.

35. By letter 30 September 2008, Jackson McDonald provided further and detailed written submissions to me in support of the complainant's assertion that the agency had not taken "all reasonable steps" to find additional documents the subject of the complainant's revised access application. Jackson McDonald's submissions were as follows:

> "*1. The Information Commissioner has characterised the test in relation to the adequacy of the Shire's searches at paragraph 1 on page 10 of the Preliminary View.*
>
> *2. The Information Commissioner has misapplied this test or has applied the wrong test in reaching the conclusion at paragraph 2 on page 10 of the Preliminary View.*
>
> *3. In the second last paragraph on page 8 of the Preliminary View the Information Commissioner refers to a test set down in* Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health (1985) 8 ALD 163 ("Anti-Fluoridation").
>
> *4. The decision in* Anti-Fluoridation *related to the Commonwealth Freedom of Information Act 1982 ("Commonwealth F0I Act"). The relevant sections of the Act relating to the adequacy of searches at that time were sections 24 and 25 of the Commonwealth F0I Act.*
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> *5. Amendments were made to the Commonwealth F0I Act in or about 1991. These amendments included the insertion of section 24A into the Commonwealth FOI Act. Section 24A of the Commonwealth FOI Act is, for all relevant purposes, identical to section 26 of the Western Australian Freedom of Information Act 1992 ("WA FOI Act').*
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> *6. The test in* Anti-Fluoridation *is that (at para 19) "the adequacy of the effort to locate the document should be judged by having regard to what was reasonable in the circumstances". This decision was in relation to a different set of statutory provisions, however Section 24A in the Commonwealth FOI Act had not then been enacted. The WA FOI Act, when enacted in 1992, incorporated in section 26 the form of words from section 24A of the Commonwealth FOI Act. Upon insertion of the new section 24A into the Commonwealth FOI Act the test in* Anti-Fluoridation *could no longer be applied without reservation. Due to the wording of section 26 of the WA FOI Act the test in* Anti-Fluoridation *is also not directly applicable in Western Australia.*
>
> *7. The Federal Court of Australia in* Chu v Telstra Corporation Ltd [2005] FCA 1730 *considered the appropriate test in section 24A of the Commonwealth FOI Act relating to the adequacy of searches.*
>
> *8. The Federal Court did so in the context of an appeal against the Administrative Appeal Tribunal's decision that searches undertaken were reasonable in the circumstances" (i.e. the AAT purported to apply the test in* Anti-Fluoridation*).*
>
> *9. The Federal Court found that the Tribunal had erred in following earlier Tribunal decisions (in particular had erred in applying the* Anti-Fluoridation *test) which required only those searches which were reasonable in the circumstances.*
>
> *The Court found at paragraphs 33 to 38:*

> *'33. At the hearing before me, and in his questions, Mr Chu put into issue whether Telstra did actually take all reasonable steps and whether the Tribunal could be satisfied that it did. Understandably his focus primarily was upon what further could reasonably have been done, and not directly with the anterior question as to proper construction of* "all reasonable steps have been taken"*. Nonetheless, I am satisfied that the latter question has been raised sufficiently in this appeal.*
>
> *34. As I indicated above, the Tribunal appears to have adopted views expressed in earlier Tribunal decisions relating to the requirements of s 24A. From its reasons it appears also to have accepted that the steps required to be taken generally "do not have to be exhaustive". What the Tribunal did not do is ask itself what the section in express terms required of it. This was not that "reasonable steps must have been taken" - to use the language of an earlier Tribunal decision relied upon. Rather it was that "**all** reasonable steps" be taken. As is apparent from the tenor of the Senate Report, the **difference between the two formulations is fundamentally important**. The Committee added the emphatic word "all" to the proposal put to, and accepted by, it in the submission it expressly accepted…*
>
> *35. It is understandable, where the decision as to the taking of all reasonable steps is left to agency or Minister concerned (subject to Tribunal review), why this more stringent requirement has been imposed. A person requesting access to a document that has been in that agency's or Minister's possession should only be able to be denied on the s 24A ground **when the agency (or the Minister) is properly satisfied that it has done all that could reasonably be required of it to find the document in question**. Taking the steps necessary to do this may in some circumstances require the agency or Minister to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered or disorganised.*
>
> *36. The Tribunal's failure to appreciate the significance of "all" has, in my view, led it to adopt a tempered and erroneous view of what is required to be done for s 24A purposes.*
>
> *37. In saying this I infer, as I earlier indicated, that it adopted the approach to s 24A espoused in earlier Tribunal decisions. In consequence I am not satisfied that the Tribunal properly understood the critical evaluation it was required to make of the steps taken by Telstra.*
>
> *38. Even though the Tribunal characterised the various searches undertaken by Telstra as being "exhaustive" (seemingly in the case of each such search), I am not satisfied that this finding in fact nullifies the significance of the error it has committed. Given the Tribunal's misunderstanding of the judgment it was required to make, it would be unsafe to assume that, properly instructed, it would necessarily adopt a like characterisation of Telstra's conduct in any event. It is*

> *possible for reasons of change of mind, re-appraisal of the evidence or otherwise that a different result could ensue:* Santa Sabina College v Minister for Education (1985) 58 ALR 527 at 540; *see also* Morales v Minister for Immigration and Ethnic Affairs (1995) 60 FCR 550. [Our emphasis]

10. *The Information Commissioner has not referred to the decision in* Chu *in the Preliminary View. Instead the Information Commissioner has erroneously applied an outdated or inadequate test.*

11. *The Information Commissioner has either erred in law by applying the wrong test; alternatively the Information Commissioner has misapplied the test in section 26 of the Freedom of Information Act 1992*

12. *The Information Commissioner must reconsider the Information Commissioner's Preliminary View in light of the decision in* Chu*. In our opinion this is one of those occasions referred to in* Chu *when the Information Commissioner* "must confront and overcome inadequacies" *in the agency's (i.e. Shire's) investigative processes.*

Submissions on the Test

13. *The test in section 26 of the FOI Act is whether "**all** reasonable steps" have been taken to find the documents.*

14. *We submit that **all** reasonable steps have not been taken.*

15. *The only steps taken by the agency to find the documents have been to ask the particular Councillor who is alleged to have sent or received the documents whether she holds copies of those documents.*

16. *We submit this is insufficient. All reasonable steps in the circumstances would include the agency:*

    (a) requesting that Councillors who may have sent emails to Councillor Tonkin or received emails from her disclose those documents; and

    (b) obtaining the hard drive of the computer on which the emails requested were sent and received and examining that hard drive to extract the relevant emails including instructing an information technology expert for this purpose.

17. *The reasons we consider that these searches are necessary for the Information Commissioner to be satisfied that "all reasonable searches" have been undertaken are set out in the following section.*

Reasonable reliance on Councillor Tonkin's searches

18. *The history of Councillor Tonkin's searches for the subject emails are as follows:*

    (a) upon initially receiving our client's access application, the Shire did not request Councillor Tonkin to provide any emails. Further, Councillor Tonkin, although made aware by Jackson McDonald of the application and her obligations, did not provide any email documents;

    (b) on 23 January 2008 we wrote to Councillor Tonkin requesting that she take action to preserve any documents held by her which may fall within the scope of our client's application.

(c) upon lodging the application for external review with the Information Commissioner, the Shire requested Councillor Tonkin to provide relevant documents. Only then did Councillor Tonkin supply some documents. When doing so, she claimed she had provided all documents falling within the scope of our client's request;

(d) on or about 7 April 2008, Councillor Tonkin attended a briefing session held with the City's solicitors. That briefing session in effect advised the Councillors that the emails in question were documents of the agency and needed to be disclosed. The very next day Councillor Tonkin located further documents. These are referred to in the Shire's letter dated 21 April 2008; and

(e) subsequent to our letter to the Information Commissioner dated 13 May 2008 in which we identified certain emails which had been sent or received by Councillor Tonkin, and which had not to that point been released by her, Councillor Tonkin subsequently discovered the additional emails. These events are set out at paragraph 34 on page 6 of the Preliminary View.

19. On at least two (2) occasions now Councillor Tonkin has claimed to have released all documents falling within the scope of our client's claim. When subsequently challenged however, Councillor Tonkin has located further documents falling within the scope of our client's claim. In the circumstances a reasonable person observing the behaviour of Councillor Tonkin would have reservations about accepting or relying on the agency's current acceptance of Councillor Tonkin's searches as constituting "all reasonable searches*."*

20. Given those matters set out in the above paragraphs, we submit that the Information Commissioner cannot decide that the Shire's reliance on Council Tonkin's assertions that she has conducted searches amounts to the Shire having conducted "all reasonable searches".

21. In light of these matters, in our opinion "all reasonable searches" *have not been undertaken to find the requested documents. This view is further supported by the clear probative evidence that at least one and more likely more, documents exist which have not been disclosed.*

Other missing documents

22. At paragraphs 5 and 6 on page 6 of the Preliminary View, the Information Commissioner identifies an email which we submit Councillor Tonkin sent and which falls within the scope of our client's claim, but which has not been disclosed. The Information Commissioner then states that we have provided no probative evidence to support this claim. This contention by the Information Commissioner is strongly opposed by our client.

23. In this respect, we refer the Information Commissioner to the statutory declaration of Jamie Blanchard dated 18 June 2008 [sic]*, the statutory declaration of Sue Bilich dated 26 February 2008, copies of which have already been provided to the Information Commissioner. We also refer the Information Commissioner to the statutory declarations of Ross William Leighton dated 30 September 2008 and Frank Lindsey dated 30 September 2008*[sic] *copies of which are attached. We contend that there is ample evidence to indicate this document or documents, in fact, exist.*

24. Given:

(a) the number of previous requests;

(b) the previous history of disclosing emails only when pressed to do so; and

(c) the fact that the email or emails sent by Councillor Tonkin to (at least) Mrs Nita Sadler (a Councillor at the time) (our client contends that Councillor Tonkin also inter alia forwarded the email or emails to Councillor Taylor) referred to in the statutory declarations have not been disclosed,

our client requests that steps be taken as identified in paragraph 16 in order to properly satisfy the "**all** reasonable steps" *test in the circumstances of this case.*

The objects of the FOI Act

25. One of the objects of the FOI Act is to make the persons and bodies that are responsible for State and Local Government more accountable to the public. The objects of the FOI Act are to be achieved by requiring that certain documents concerning State and Local Government operations be made available to the public.

26. Our client has requested documents sent and received by Councillors Tonkin, Taylor and Sadler. Our client has provided probative evidence to suggest that Councillor Tonkin sent at least one email (quite possibly more) which she has not disclosed and that Councillors Taylor and Sadler received that email or emails which they also have not disclosed.

27. For the reasons set out above, the searches undertaken by Councillor Tonkin have proved to be unreliable. In the same vein, Councillor Taylor has admitted to having her computer "fixed" resulting, according to Councillor Taylor, in all emails relevant to our client's claim being deleted. Former Councillor Nita Sadler has admitted to deleting from her computer all emails relating to our client's claim.

28. The subject emails being requested from Councillor Tonkin, Taylor and Sadler are the same. Given our client's concern from the outset that the author of the emails might wish to suppress the disclosure of the subject emails, our client took the precaution of requesting any emails sent by Councillor Tonkin to Councillors Taylor and Sadler.

29. The Information Commissioner ought to assess the conduct of the three (3) Councillors in their totality. The subject emails are the same. The hard drives and servers of all three (3) Councillors will, if our client is correct, contain copies of the emails in question.

30. We do not consider it appropriate for the request for documents sent and received by Councillor Tonkin to be considered in isolation from the applications for documents sent and received by Councillors Taylor and Sadler. The three (3) applications are connected. They involve the same emails, sent by one party to the other parties. On our client's case, the author of the emails has to date:

(a) failed to comply with her obligations, until in effect, being "caught out" by the process and then she has only disclosed the particular emails concerned; and

(b) failed to disclose further emails falling within the scope.

On the other hand the two (2) recipients of the emails both maintain they have one way or another wiped their hard drives and servers.

31. The totality of this chain of events strongly suggests that inadequate disclosure has been made and further emails exist which ought to be disclosed.

32. The Information Commissioner has the power to call forward and check hard drives and servers to verify whether proper disclosure has been made. This is a circumstance where "all reasonable searches" dictate that this should be done.

33. We do not believe that the Information Commissioner can properly find that "all reasonable searches" have been undertaken until such time as the issue relating to the "fixing" of Councillor Taylor's computer and the deletion of emails on Councillor Sadler's computer and the allegation that failure to disclose further emails have been checked.

The Information Commissioner's powers

34. The Shire claims to have undertaken all reasonable searches and advises there are documents that cannot be found or do not exist. To the contrary our client claims that:

(a) there are further documents failing within the scope of this claim which do exist and have not been disclosed: and

(b) in any event all reasonable searches have not been undertaken.

35. The Information Commissioner is charged with the task of deciding, objectively and independently, which of these two versions is correct.

36. The Information Commissioner has the power to do the things which our client has described by the information Commissioner at paragraph 5 on page 7 of the Preliminary View and which our client has requested him to do. Under section 72 of the WA FOI Act, the Commissioner may give written notice to a person requiring that person to produce a document to the Commissioner.

37. The definition of document in the glossary to the WA FOI Act includes any record, any part of a record, any copy, reproduction or duplicate of a record or any part of a copy, reproduction or duplicate of a record.

38. Record is defined in the glossary of the WA FOI Act to mean any record of information however recorded and includes any article on which information has been stored or recorded, either mechanically, magnetically or electronically.

39. The powers under section 72 of the FOI Act 1992 extend to a power to require Councillor Tonkin (and the other Councillors) to produce to the Commissioner the computer on which the requested documents were sent and received and which contain all documents sent and received to the email address used by Councillor Tonkin (and the email addresses used by other Councillors) in her role as a Councillor of the Shire.

40. Thus, the Information Commissioner has the power to conduct searches for the requested documents. Such searches are required to achieve an object of the WA FOI Act and for the interests and attainment of justice. We submit that in such circumstances it is both proper and necessary that the Information Commissioner personally or through an expert conduct such searches and resolve this matter once and for all.

41. We note our previous submissions made to the Information Commissioner which establish that public funds have been used by Councillor Tonkin (and the other Councillors) to maintain this computer and its internet access.

42. In light of the dispute set out above, we do not consider that it is appropriate for the Information Commissioner to decline to exercise the power to conduct a search of Councillor Tonkin's (and the other Councillors') computer. Nor is it appropriate to accept on its face the Shire's assertions that the documents cannot be found or do not exist.

43. The Commissioner has the role of independently and objectively determining whether our client's or the Shire's version of events is right. That is, in our opinion, it is the duty of the Information Commissioner to resolve the dispute between the parties regarding the existence of the emails.

44. The subject emails in our client's submission exist on all three (3) hard drives or servers of Councillors Tonkin, Taylor and Nita Sadler (or her husband Councillor David Sadler). Despite the assertion by Councillors Taylor and Sadler that they have deleted the emails, there is expert advice to the effect that the emails will remain in existence on the hard drive or server in question and the task of obtaining them is a relatively simple one. In this respect we refer the Information Commissioner to our letter dated 17 March 2008 in which we advised that the procedure had been put in place by our client to retrieve Councillor Nita Sadler's emails, when succumbing to pressure from her husband Councillor David Sadler, at the last minute Councillor Nita Sadler refused our client's request for an expert to retrieve the emails, saying that given her husband's objection to her voluntarily cooperating with our client, she preferred to do so under compulsion.

45. We submit that in the circumstances, the Information Commissioner must exercise available powers to require Councillor Tonkin (or Councillors Taylor or Sadler) to produce her computer to enable the Information Commissioner to finally resolve the issue in dispute and place this matter beyond doubt.

Other Matters

46. We enclose draft letters we have prepared to send to the Shire and to Councillors Tonkin, Taylor and David Sadler and former Councillor Nita Sadler (a Councillor at the material time).

47. The Preliminary View contains certain allegations about our client which were contained in an email made by Councillor Tonkin that the Shire has not to date been disclosed. These allegations are detailed in paragraph 5 on page 6 of the Preliminary View. We submit that any final published decision should not include these allegations. They are false and particularly damaging to our client's reputation and standing in the community. Please ensure that any published decision does not include the allegations in either detail or summary.

Summary

48. The Information Commissioner has applied the wrong test.

49. When the correct test is applied it is apparent that all reasonable searches have not been undertaken.

50. One existing Councillor, one former Councillor (Sue Bilich), a lawyer, Jamie Blanchard and our client have all sworn statutory declarations from which a strong inference arises that not all documents within the scope of the applications have been disclosed. The hard drives and servers of the three Councillors concerned may be searched and the documents retrieved which will definitely answer the applications.

51. The Information Commissioner has the power to retrieve such emails.

52. This is a matter where the Information Commissioner ought to exercise his power to resolve the dispute."

Consideration

36. I have carefully considered the complainant's very detailed submissions, as set out above as well as the submissions of the agency. I have also carefully considered all the material put before me by the complainant in support of his submissions. For the reasons set out in the following paragraphs, I do not accept those submissions.

37. At paragraphs 1 to 17 of the submissions dated 30 September 2008, Jackson McDonald asserts that in my preliminary view letter I have referred to a 'test' set down in *Re Anti-Fluoridation* and that I have misapplied that 'test' or applied the wrong test in reaching the conclusion that the searches undertaken by the agency and by Councillor Tonkin have been reasonable in the circumstances.

38. The passage I referred to in my preliminary view letter was also contained in a submission that was made to the Administrative Appeals Tribunal ('the AAT') by Counsel for the respondent agency, the then Commonwealth Department of Health. In that case, Counsel submitted that "…*the adequacy of the effort made to locate the document should be judged by having regard to what was reasonable in the circumstances.*" That submission was accepted by the AAT, having regard to the undisputed facts and circumstances in the *Re Anti-Fluoridation* case. In several decisions relating to the meaning and interpretation of section 26 of the FOI Act, (see for example *Re Barrett and Police Force of Western Australia* [1995] WAICmr 32; *Re Anderson and Water Corporation* [2004] WAICmr 22) the former Information Commissioner ('the former Commissioner') and the former A/Commissioner have referred to the approach proposed in that submission as being relevant when considering the nature and scope of the Information Commissioner's powers under section 26 of the FOI Act.

39. In *Chu v Telstra Corporation Limited* [2005] FCA 1730, the Federal Court of Australia considered an appeal by Mr Chu against a decision of the AAT. The AAT had affirmed a decision made by Telstra, under section 24A of the Commonwealth FOI Act - the Commonwealth equivalent of section 26 in the WA FOI Act – that all reasonable attempts had been made by Telstra to locate Mr Chu's personal file or other files related to Mr Chu but that his personal file could not be found or did not exist. I consider that the reasoning as explained by Finn J of the Federal Court regarding the emphatic requirement that *all* reasonable steps be taken, is equally relevant to the application of section 26(1) of the WA FOI Act, where effectively the same words are adopted to those in the equivalent section 24A of the Commonwealth FOI Act.

40. I have obtained and reviewed a copy of the AAT decision that was the subject of Mr Chu's appeal to the Federal Court (see: *Chu and Telstra Corporation*

Limited [2004] AATA 1127). In affirming Telstra's decision to refuse Mr Chu access to his personal file, on the ground that that file could not be found or did not exist, the presiding member of the AAT, Miss Shanahan, referred to several earlier decisions of the AAT in relation to the meaning and interpretation of section 24A of the Commonwealth FOI Act, including *Re Langer and Telstra Limited* (2002) AATA 341; *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138; *Re Simmons and Secretary, Department of Defence* (2000) AATA 491 and *Re Beesley and Federal Commissioner of Taxation* (2001) AATA 476.

41. However, there is no reference to the *Anti-Fluoridation* decision in the AAT's reasons for decision in *Chu and Telstra Corporation Limited* [2004] AATA 1127 and nothing in that decision states that, in affirming Telstra's decision, the AAT applied or had any regard to the decision in the *Anti-Fluoridation* case. Moreover, contrary to the submissions, the Federal Court did not find that the AAT had erred in following earlier AAT decisions (and, in particular, in applying the approach adopted in *Anti-Fluoridation*). The Federal Court said that what the AAT did not do in Chu's appeal to the AAT, was to:

> *"…ask itself what the section* (section 24A of the Commonwealth FOI Act) *in express terms required of it. This was not that* "reasonable steps must have been taken" *– to use the language of an earlier Tribunal decision relied upon. Rather, it was that* "all reasonable steps" *had been taken. As is apparent from the tenor of the Senate Report, the difference between the two formulations is fundamentally important*
>
> *It is understandable, where the decision as to the taking of all reasonable steps is left to the agency or Minister concerned (subject to Tribunal review), why this more stringent requirement has been imposed. A person requesting access to a document that has been in the agency's or Minister's possession should only be able to be denied on the s 24A ground when the agency (or the Minister) is properly satisfied that it has done all that could reasonably be required of it to find the document in question."*

42. In *Chu v Telstra Corporation Limited* [2005] FCA 1730, the Federal Court stated that the AAT's failure to appreciate the significance of the word "all" in s 24A of the Commonwealth FOI Act led the AAT to adopt a tempered and erroneous view of what was required to be done for s 24A purposes. The Federal Court also said it was not satisfied that the AAT had properly understood the critical evaluation it was required to make of the steps (searches) taken by Telstra and, as a result, remitted the matter back to the AAT, to be heard and decided again. In the event, when the AAT reheard the matter and took account of the Federal Court's decision, the AAT found that Telstra had taken all reasonable searches to find Mr Chu's personal file. The AAT's decision was expressed to apply to the individual area searches/steps and the totality of Telstra's efforts to locate Mr Chu's personal file.

43. There is a distinct difference between the facts in *Chu*'s case and facts in this complaint. In *Chu*'s case, there was uncontradicted evidence before both the AAT and the Federal Court that Telstra and its immediate predecessor, Telecom, had maintained individual personal files, called 'blue files', in relation to all of

its employees. In *Chu*'s case, Telstra's decision-makers advised Mr Chu that, given his period of employment with Telstra, it was very likely that there would have been an individual personal file relating to him but despite significant searches by a number Telstra officers, the blue personal file relating to him could not be found by Telstra or did not exist.

44. In the matter before me, there is no uncontradicted evidence that additional documents within the revised scope of the complainant's application should in fact exist. Jackson McDonald assert that the complainant has provided me with "*probative evidence*" to establish that at least one, and possibly more emails exist, that were sent and received by former Councillor Sadler but which have not been revealed as part of the complainant's access application. In support of that claim, Jackson McDonald referred me to the four statutory declarations it had sent to me in relation to this matter. Those statutory declarations were made by Mr Jamie Blanchard of Messrs Jackson McDonald, on 18 January 2008, by former Councillor Ms Sue Bilich on 26 February 2008, by the complainant on 30 September 2008 and by Councillor Frank Lindsey on 29 September 2008.

45. In his statutory declaration, Mr Blanchard states, among other things, that in mid-December 2007 he received a telephone call from former Councillor Sadler during which she had said to him words "*…to the effect that there were certain emails which she had received from Councillor Tonkin and from a third party that had not been provided to the Shire or to the Freedom of Information Commissioner*". Mr Blanchard states that he understood former Councillor Sadler's advice to mean that there were certain emails which she had received from Councillor Tonkin but which had not been provided to the agency or to the Information Commissioner.

46. I have considered Mr Blanchard's statutory declaration. However, that declaration is based on an interpretation of former Councillor Sadler's telephone comments at the relevant time. I note that that statutory declaration was made in mid-January 2008, three months before the agency decided, on 21 April 2008, to give the complainant access to all of the disputed documents as well as a substantial number of additional documents, including emails sent to former Councillor Sadler by Councillor Tonkin and a number of emails sent to former Councillor Sadler by third parties, which documents were created after the complainant's access application was received at the agency. Whilst the information recorded in Mr Blanchard's statutory declaration may have been relevant in mid-January 2008, following the release of documents referred to above by the agency, on 21 April 2008, I consider that the issues raised in Mr Blanchard's statutory declaration have been largely addressed by way of the provision to the complainant of emails from Councillor Tonkin. It does not therefore follow that there are likely to be other requested documents that have not been disclosed.

47. In her statutory declaration, former Councillor Bilich states, among other things, that she was, at the relevant time, a Councillor of the agency; that she assumed that there would be emails passing between Councillors of the agency - who she identified by name - and that she came to the conclusion that it was normal for those particular Councillors to have passed emails between them. Former

Councillor Bilich states that she did not receive any emails from Councillor Tonkin about the complainant's proposed Scheme Amendment.

48. Former Councillor Bilich states that she was aware of emails being passed around by Councillors and that she also overheard conversations between Councillor Taylor and Councillor Tonkin around Council chambers, although not during meetings. Former Councillor Bilich states that she had not been sent copies of the emails. Former Councillor Bilich states that no-one ever told her directly the content of the emails that she believed were passing around but that she recalled hearing - and she believed - that one of the emails allegedly contained unflattering comments about the complainant but that she cannot remember where she heard this.

49. Former Councillor Bilich states that she had spoken to former Councillor Sadler about emails sent at the time of the proposed Scheme Amendment. Former Councillor Bilich states that former Councillor Sadler "*admitted*" to her that emails had been sent to former Councillor Sadler by other Councillors and by objectors to the complainant's proposal; that former Councillor Sadler had allegedly told former Councillor Bilich that she was included in some of the email exchanges that were sent to and from Councillor Tonkin but that former Councillor Sadler believes she was not included in all the email exchanges.

50. I have considered the information set out in former Councillor Bilich's statutory declaration. Much of the information in the statutory declaration is speculative. Some is based on assumptions, or on overheard conversations, or is uncorroborated and unsupported by documents or by other material.

51. I do not accept that the statements made by former Councillor Bilich support the complainant's assertion that additional documents probably exist at the agency. Among the copy documents released to the complainant by the agency are copies of two emails, dated 21 June 2007 and 12 July 2007, which relate to the complainant's proposed Scheme Amendment, which were sent to former Councillor Bilich by Councillor Tonkin. This contradicts the statement that former Councillor Bilich did not receive any emails from Councillor Tonkin about the complainant's proposed scheme amendment. In addition, there are five emails, dated 7 May 2007, 17 May 2007,14 June 2007, 20 June 2007 and 21 June 2007, which also relate to the complainant's proposed Scheme Amendment. Finally, there is also an email dated 27 June 2007 which former Councillor Sadler sent to former Councillor Bilich about the complainant's proposed Scheme Amendment.

52. Given the speculative nature of some of former Councillor Bilich's statements, and given that former Councillor Bilich states that she has not seen the email which allegedly contained unflattering comments about the complainant and that she cannot remember where she heard about that email, I accord little probative weight to the information recorded in former Councillor Bilich's statutory declaration. I am not satisfied that anything in former Councillor Bilich's statement establishes that the email which allegedly contained unflattering comments about the complainant is likely to exist.

53. In his statutory declaration, the complainant states that in or about September 2007, he had a meeting with Councillor D McKechnie of the agency. The complainant states that Councillor McKechnie told the complainant about a conversation Councillor McKechnie had had with former Councillor Sadler shortly before the complainant's meeting with Councillor McKechnie in September 2007. The complainant claims that Councillor McKechnie told him that former Councillor Sadler had told Councillor McKechnie that, leading up to the July 2007 Council Meeting, former Councillor Sadler had received a number of emails from Councillor Tonkin about the proposed scheme amendment; that former Councillor Sadler had warned Councillor Tonkin not to send any more emails to her due to the offensive content of those emails; that former Councillor Sadler informed Councillor McKechnie that the emails offended her and, finally, that former Councillor Sadler had read to Councillor McKechnie the contents of an email former Councillor Sadler had received from Councillor Tonkin which contained unflattering comments about the complainant.

54. In his statutory declaration, Councillor Lindsey states in or about September 2007, he had a meeting with Councillor McKechnie who had told him about the conversation Councillor McKechnie had had with former Councillor Sadler shortly before September 2007. Councillor Lindsey states that Councillor McKechnie told him about an email that former Councillor Sadler had received from Councillor Tonkin; that former Councillor Sadler had read the contents of that email to Councillor McKechnie and that the email contained unflattering comments about the complainant.

55. Most, if not all, of the information recorded in the statutory declarations submitted by Jackson McDonald from the complainant and from Councillor Lindsey consists of uncorroborated evidence. While both statutory declarations seek to suggest the existence of an email, they both refer to the same conversation between former Councillor Sadler and Councillor McKechnie. There is no supporting documentary evidence or other probative material containing direct evidence from the person who allegedly received the email which is said to contain unflattering comments about the complainant.

56. In addition, as part of my office's inquiries with the agency on 25 July 2008, referred to at paragraph 30, my office sought information from Councillor Tonkin concerning the existence of the email in question. In response, Councillor Tonkin advised that she does not have a copy of the email; that she has no recollection of sending such an email to former Councillor Sadler; and that the alleged email is 'couched' in terms that she would not use.

57. Moreover, two of my officers have independently examined all of the documents released to the complainant by the agency, copies of which have been provided to my office by Jackson McDonald. Those documents include copies of the documents released to the complainant arising from another FOI application Jackson McDonald made to the agency on behalf of the complainant. Among those documents are copies of several emails exchanged between several councillors, including former Councillor Sadler and Councillor Tonkin. However, nothing in any of those emails confirms or corroborates the information recorded in the complainant's statutory declaration or Councillor

Lindsey's statutory declaration. In the absence of any supporting evidence to the required probative standard, I am not persuaded that the email referred to in the conversations reported in those statutory declarations is likely to exist.

58. I have also considered the complainant's submissions about the history and adequacy of the searches conducted by Councillor Tonkin. Amongst other things, Jackson McDonald asserts that Councillor Tonkin:

- did not initially provide any email documents to the agency, despite being made aware by Jackson McDonald of the complainant's access application to the agency;
- only supplied some relevant documents to the agency after the complainant's application for external review had been lodged with the former A/Commissioner and claimed that she had provided all documents falling with the scope of the complainant's access application;
- attended a briefing session held by the agency's solicitors, on or about 7 April 2008 and the very next day located further documents which are referred to in the agency's letter dated 21 April 2008;
- discovered some additional emails, once Jackson McDonald had identified those emails; and
- claimed, on at least two occasions, to have released all documents falling within the scope of the complainant's access application but, when subsequently challenged, found further documents falling within the scope of the complainant's access application.

59. Jackson McDonald's assertions against Councillor Tonkin, as set out above, are premised on the basis that Councillor Tonkin was less than open and forthcoming in searching her records. The documents presently before me, including the documents retained on the agency's FOI file, contradict those assertions.

60. Following receipt of Jackson McDonald's letter dated 17 July 2007, clarifying the revised scope of the complainant's access application, the agency sought advice from its legal advisers and, acting on that advice, the former CEO of the agency requested Councillor Tonkin to undertake searches of records held by her for the requested documents. There is evidence before me, which I accept, establishing that Councillor Tonkin spent two days reviewing her records and identified and provided to the agency the documents which she had located, some of which fell within the revised scope of the complainant's access application and others which fell outside the scope of that application.

61. Finally, I note that Jackson McDonald claimed that Councillor Tonkin and/or the agency had failed to disclose documents which fell within the revised scope of the complainant's access application. In its letter dated 13 May 2008, Jackson McDonald drew to my attention that a number of documents that had been released to the complainant by the agency on 21 April 2008 referred to other documents which had not been released by the agency.

62. However, an examination of the documents referred to by Jackson McDonald in its letter dated 13 May 2008 reveals that, apart from the three documents referred to at paragraph 25, none of those documents fell within the revised scope of the complainant's access application. The complainant lodged his access application with the agency on 12 June 2007. On 17 July 2007, Jackson McDonald confirmed that the complainant had reduced the scope of his access application and, by letter dated 8 August 2007, Jackson McDonald confirmed that its letter dated 17 July 2007 was not a "fresh" application but, rather, that it constituted a reduction in the scope of the application dated 12 June 2007. That being the case, the documents falling within the revised scope of the complainant's access application were those documents falling between the dates 1 January 2007 and 12 June 2007.

63. The documents referred to by Jackson McDonald post-date the receipt of the complainant's access application and, accordingly all of those documents, and any other documents released to the complainant by the agency which are dated after 12 June 2007 do not fall within the revised scope of the complainant's access application and, in the context of that application, the agency was under no obligation, under the FOI Act, to consider and make a decision on access in relation to those documents.

64. When the complainant applied for external review of the agency's decision on access – by letter dated 31 August 2007 – his complaint was made to the former A/Commissioner on the ground that he was seeking review of the agency's decision that the documents to which he had then been refused access were not documents of the agency and, in the alternative, that they were all exempt under clause 3 of Schedule 1 to the FOI Act.

65. However, by letter dated 13 September 2007, Jackson McDonald sought to extend the scope of the complainant's complaint to include a "*…review of the adequacy of searches undertaken by the agency*" because the complainant had informed Jackson McDonald that "*…he has recently been made aware that there may be documents which fall within the scope of his claim but which have not been identified in the Schedule of Documents prepared by the Shire in its notice of decision of 17 August 2007.*" Jackson McDonald further advised that: "*The complainant has been informed that there may be at least one e-mail between Cr Pauline Tonkin and another Councillor of the Shire, Cr Nita Sadler which has not been referred to in the notice of decision.*"

66. When dealing with complaints, s70(1) of the FOI Act allows me to obtain information from such persons and sources, and make such investigations and inquiries, as I think fit. Section 70(2) of the FOI Act provides that I am not bound by the rules of evidence, and directs that proceedings on a complaint are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the FOI Act and a proper consideration of the matters before me permit. I take this to mean that I am not bound by technicalities, legal forms or rules of evidence and that I should act according to substantial justice and the merits and all the circumstances of each particular complaint.

67. In this complaint some of the submissions have been quite detailed and, of necessity, technical in nature. This has required me to give careful consideration to the written submissions and supporting evidence, and my officers have undertaken investigations into the record-keeping practices of the agency and made extensive inquiries with the agency, which has inevitably taken considerable time. I am conscious of the need to resolve FOI complaints as soon as reasonably practicable.

68. I am not persuaded to accept the opinion evidence contained in the statutory declarations. These declarations provide evidence that, according to the complainant, suggests other documents sought by the complainant should exist. The probative value of the declarations is not strong. The declarations are general in nature. They present information which relies on inferences or opinions from which the complainant asks me to conclude that such documents should exist. Those inferences are in turn derived from hearsay or the opinions or conversations reported in the declarations. The declarations do not provide direct evidence that any declarant has themselves received or seen the documents that are claimed to exist. Rather the declarations report the comments of other persons. Weighing the whole of the evidence and considering all the circumstances, I prefer the view, based on the evidence of searches made by the agency and by Councillor Tonkin, which I consider to have been reasonably directed and thorough, and the disclosure to the complainant of documents within the scope of the access application as well as other documents that were also located but were outside the scope of the application, that there are no additional documents in the possession or control of the agency or its officers which fall within the revised scope of the complainant's access application, or that if they exist, they cannot be found. I therefore conclude that there are no reasonable grounds to believe that the agency or its officers have in their possession or control any documents within the scope of the complainant's access application not already disclosed.

69. By letters dated 13 May 2008 and 30 September 2008, respectively, the complainant asserted, through his legal advisers, that "all reasonable searches" to find the requested documents have not been taken by the agency and by Councillor Tonkin and, accordingly, that I should intervene and use my powers under the FOI Act to require the production of the computer hard drives and access the computer servers used by Councillor Tonkin at the relevant time and then engage an information technology expert to undertake a forensic analysis of those hard drives and servers to disclose whether all documents falling within the scope of the complainant's access application have been 'revealed'.

70. I am empowered by section 76(1) of the FOI Act to review any decision made by the agency and to decide any matter in relation to an access application that could have been decided by the agency. In my view, that power includes the ability to raise and deal with a "sufficiency of search" issue, even if that issue was not raised initially by the complainant with the agency, as is the case in this matter. The complainant asserts that additional documents of the kind he requested exist at the agency and that the agency has, therefore, refused him access to those additional documents because the agency has "failed" to disclose the "missing" documents to him. In effect, the complainant has applied for

review of a deemed decision by the agency to refuse him access to documents under s.26 of the FOI Act. Therefore, that is the decision that I am reviewing. The former Commissioner and the former A/Commissioner have, on a number of previous occasions, dealt with complaints where a complainant claimed that additional documents "exist" that have not been identified by the relevant agency (see: *Re Oset and Ministry of the Premier and Cabinet* [1994] WAICmr 14; *Re Barrett and Police Force of Western Australia* [1995] WAICmr 32 and *Re Anderson and Water Corporation* [2004] WAICmr 22).

71. Both the former Commissioner and the former A/Commissioner have expressed the view that the function of the Information Commissioner on external review, when considering a complaint of a denial of access on the ground that an agency is taken to have refused access to documents within the scope of the complainant's access application because the agency has "failed" to identify all of the documents falling within the scope of the access application, is, of necessity, limited to inquiring into the adequacy of the searches conducted by the agency. I agree with the views expressed by the former Commissioner and the former A/Commissioner in that regard.

72. Where a complainant raises as an issue the existence of additional documents that have not been identified by the agency - as the complainant has in this matter - there are two questions that must be answered. The first question is (a) "*Are there reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency?*" Where that question is answered in the affirmative, the second question is (b) "*Has the agency taken all reasonable steps to find the requested documents*" (see: *Re Anderson* at paragraph 19).

(a) Are there reasonable grounds to believe that additional documents exist or should exist?

73. It is my understanding that the complainant bases his assertion that additional documents falling within the scope of his access application exist or should exist at the agency because:

- he had been made aware, in mid-September 2007, that there 'may be' documents which fell within the scope of his access application which had not been identified by the agency, and, in particular, there may be at least one e-mail between Councillor Tonkin and former Councillor Sadler that had not been referred to in the agency's notice of decision;

- Mr Blanchard has sworn a statutory declaration (see: paragraph 45 above) in which it was stated that certain emails existed that had not been provided to the agency or to me;

- former Councillor Bilich has sworn a statutory declaration (see: paragraphs 47 to 49 above) about, among other things, certain emails she said she had heard about but not seen, purportedly relating to the proposed Scheme Amendment;

- he swore a statutory declaration on 30 September 2008 (see: paragraph 53 above) relating to a conversation he had had with Councillor McKechnie in September 2007, who allegedly told the complainant about a conversation Councillor McKechnie purportedly had with former Councillor Sadler 12 months previously, in or about September 2007; and

- Councillor Lindsey swore a statutory declaration on 29 September 2008 (see: paragraph 54 above) stating that 12 months before, in early and late September 2007, he had been present at two meetings with Councillor McKechnie, at which meetings Councillor McKechnie had allegedly told Councillor Lindsey about his recollection of certain discussions Councillor McKechnie had had with former Councillor Sadler in or about September 2007.

74. The statutory declarations sworn by former Councillor Bilich, the complainant and Councillor Lindsey suggest the existence of one particular email, being an email that was allegedly sent to former Councillor Sadler by Councillor Tonkin relating to the proposed Scheme Amendment and which allegedly contained unflattering comments about the complainant.

75. There is no reference to that "missing" email recorded in Mr Blanchard's statutory declaration and, as I stated at paragraph 46, I consider the issues raised in that statutory declaration were addressed on 21 April 2008, when the agency released documents, including emails exchanged between former Councillor Sadler and Councillor Tonkin to the complainant.

76. As regards the statutory declaration sworn by former Councillor Bilich, I note that most of that statutory declaration consists of 'hearsay' evidence; that former Councillor Bilich clearly states that she has never seen the allegedly "missing" email; and that she cannot remember where she heard about that email.

77. Finally, the statutory declarations by the complainant and Councillor Lindsey about the allegedly "missing" email is unsupported hearsay, given that neither the complainant nor Councillor Lindsey have stated that either of them have seen the "missing" email, but rather rely on the statements of others, who have not provided supporting evidence to that effect. I am not persuaded that the "missing" email exists nor should exist, nor am I persuaded that any other additional documents within the scope of the complainant's access application exist at the agency.

Determination

78. For the reasons set out in paragraphs 73 to 77 above, I am not satisfied that the complainant has established, to the required probative standard, that any additional documents of the kind described in his revised access application, exist or should exist at the agency.

Have all reasonable steps been taken to find the requested documents?

79. In the event that I was satisfied that there were reasonable grounds to believe that additional documents of the kind described by the complainant actually exist or should exist and are, or should be, held by the agency - and for the reasons set out above I am not so satisfied - then it would be my duty under the FOI Act to inquire into the adequacy of the searches conducted by the agency in order to identify the requested documents. Although this is not a matter upon which I am required to make a decision, because I am not satisfied that any additional documents of the kind described by the complainant exist, nonetheless, my office made detailed inquiries with the agency and with Councillor Tonkin in order to obtain information about the nature and extent of the searches undertaken by the agency and by Councillor Tonkin for the requested documents. The agency has advised me as follows:

- the agency did not initially review documents held within its offices when dealing with the complainant's access application, beyond checking for emails from Councillor Tonkin submitting records to the agency, on the basis that documents held by the agency's Administration, including all emails to and from Staff and Councillors, had been released to the complainant in response to previous FOI applications;

- the former CEO of the agency directed the agency's Records Officer to review all previously identified documents which have a CC, BCC or which had Councillor Tonkin's name within the emails, which fit within the search criteria and which had not previously been released to the complainant;

- the searches undertaken by the agency's Records Officer included reviewing the Central Records System, via the Electronic Document Management System. The search criteria used by the agency's Records Officer was reviewing the electronic file (GV-01/032), searching on 32 Gavour Road, Aged Care Facilit*, Rezon* Gavour, Scheme Gavour, Special Elect*. A search was also conducted on 'Tonkin' (in the name field and keywords).

- the agency's Records Officer also searched the hardcopies on file, a working copy of duplicates created by the Executive Manager Planning Services, all Executive Manager computers and email and no new documents within the date range and search parameters were found.

80. Councillor Tonkin, in response to the inquiries made by my office, advised me that:

- the agency does not supply councillors with computers or with an individual email addresses and, as a result, her emails are collected on her husband's business computer at home;

- prior to this complaint being made to me she did not previously separately store emails relating to Council matters in separate folders or files;

- her initial searches for emails relating to the complainant's access application took her two days and she believed at that time that she had located all of the relevant emails requested;

- following a subsequent search, after further information was received from the complainant, she found a couple more emails;

- she had searched all emails in the Inbox, Sent Items, Deleted Items and folders on her husband's home computer and that search included "*…opening nearly every email in case it was from a resident whose name* [she] *didn't know and then print*[ing] *it out"*; and

- all hard copy letters held within the scope of the complainant's access application were filed and passed on to the agency, as requested.

Consideration

81. In this matter, although it is not a question for me to decide - given that I am not satisfied that any additional documents of the kind which the complainant insists exist or should exist at the agency – I have considered in detail whether there is any substance to the complainant's assertion that the agency and its officers – which officers under the FOI Act include councillors of the agency - have not undertaken all reasonable steps necessary to locate the requested documents which fall within the revised scope of his access application.

82. In *Chu v Telstra Corporation Limited* [2005] FCA 1730, Finn J of the Federal Court said, at paragraphs 12 and 14:

> *"However, what the scheme of the* [Commonwealth] *Act does suggest in general terms is that in a matter, (i) in which the Minister or agency is expected to balance the general right of access to documents against another designated public interest; and (ii) in respect of which that Minister or agency is to be taken by virtue of function or responsibility to possess the necessary particular knowledge or experience to make the required judgment, then (whether or not the judgment to be made is circumscribed by other requirements for example, designated relevant considerations) the judgment will be that of the Minister or agency and not of the Court. Given the inquiry posed by s 24A's* "all reasonable steps" *requirement this provides some – albeit slight – support for the view that the requirement being one tied to intra departmental or agency structures, practices and record keeping policies and practices, its fulfilment is one of which the Minister or agency is to be the judge…*
>
> *I have already indicated what, in the language of s 24A itself, could be taken as suggesting that the requirement of all reasonable steps having been taken is itself jurisdictional in character. Nonetheless, I am satisfied, that in the context both of the* [Commonwealth] *and its purposes and of the known provenance of the section itself, the* ***judgment to be made is for the agency in question and, upon review, for the Tribunal and not ultimately for the Court.*** (My emphasis)

83. Taking into account the above-mentioned decision of the Federal Court, it is clear to me that on external review, the judgment as to whether all reasonable steps have been taken to locate the requested documents is a judgment I must make, based on the material before me and all the surrounding circumstances.

84. Under the FOI Act, the onus is on the complainant, as the person asserting that documents should exist, to provide me with information and material to establish his claim.

85. The complainant sought to establish that there should be more documents in existence in the possession and custody of the agency or its officers by pointing to the agency's failure to respond fully and completely to the complainant's access application, and by references in submissions and statutory declarations to conversations that point to the existence of other documents. On the other hand, my officers have made detailed inquiries about the processes or searches and record handling undertaken by the agency and councillors, which processes I find to be reasonable and thorough; the agency and Councillor Tonkin have, on undertaking a review of their earlier searches, located other documents which they have disclosed. I find that those actions are consistent with an open and accountable approach, rather than suggestive of concealing of undisclosed documents within the scope of the access application as urged by the complainant; and the statutory declarations themselves do not persuade me that other documents should exist because those declarations rely on conversations in general terms and on the views or beliefs of other persons and seek to infer from those conversations and recorded beliefs and opinions that other documents should exist, but do not point with any particularity to dates or specific documents. On balance, therefore, I am satisfied that all reasonable steps have been taken by the agency and by Councillor Tonkin to search for documents within the revised scope of the complainant's access application.

86. In this instance, I am satisfied that the agency has now taken all reasonable steps to locate the requested documents and that nothing more could be done in order to satisfy the access application. I am also satisfied that the documents which the complainant asserts should exist at the agency do not exist or cannot be found.

87. It is not my function under the FOI Act, as Information Commissioner, nor is it the function of my staff, to physically search for documents or to examine in detail an agency's record keeping systems. I am not persuaded that other documents of the kind described in the revised scope of the complainant's access application should exist. Accordingly, I do not intend to divert any more of the very limited resources of my office by requiring either the agency or any councillor, including Councillor Tonkin, to produce to me the computers on which the requested documents were sent and received in order to personally conduct searches for the requested documents, as requested by the complainant. I also do not intend to obtain the services of an information technology expert, in order to enable such a person to conduct searches of the allegedly "missing" documents, as urged by the complainant,

CONCLUSION

88. I am not satisfied that any additional documents of the kind described by the complainant exist. In any event, I am satisfied that, in the circumstances of this complaint, all reasonable steps have been taken by the agency to find those additional documents. I find, therefore, that the documents to which the complainant seeks access either do not exist or cannot be found and confirm the agency's deemed decision to refuse the complainant access to those documents under s.26 of the FOI Act.

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