OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2008095 Decision Ref: D0522008

Participants:

Ross William Leighton
Complainant

- and -

Shire of Kalamunda
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – e-mails received by a councillor and by a former councillor of a local government – whether documents held by a former councillor are 'documents of an agency' – whether 'officer' of an agency includes a former officer of an agency– whether documents that are not required to be retained by an agency are documents of an agency – section 26 – whether reasonable grounds to believe that requested documents exist or should exist – whether all reasonable steps taken to find documents – meaning of all reasonable steps – whether reasonable to require forensic examination of councillor's home computer.

Freedom of Information Act 1992: sections 10(1), 26(1), 30, 39(3), 63(3), 70(2), 72(1)(a), 104, 107 and 110; Schedule 1: clauses 3(3) and 3(4); Schedule 2: Glossary, clauses 1 and 4(1)
Interpretation Act 1984: sections 8 and 18
State Records Act 2000
Retail Hours Act 1984: section 39(g)

Information Commissioner for Western Australia v Ministry of Justice [2001] WASC 3
Re Swift and Shire of Busselton [2003] WAICmr 7
Pelka v Sundquist [2005] WASC 52
Salaries & Allowances Tribunal v West Australian Newspapers Ltd [2008] WASC 39
Re Price and Nominal Defendant (1999) 5 QAR 80
Re Gallop and Ministry of the Premier and Cabinet [1996] WAICmr 65
Re Miles and Electricity Corporation [1999] WAICmr 31
Re Black and Electricity Corporation [1999] WAICmr 33
Re Doohan and Police Force of Western Australia [1994] WAICmr 13
Chu v Telstra Corporation Ltd [2005] FCA 1730
Re Ainsworth and Criminal Justice Commission (1999) 5 QAR 284

Re Oset and Ministry of the Premier and Cabinet [1994] WAICmr 14
Re Boland and City of Melville [1996] WAICmr 53
Re Cristovao and Secretary, Department of Social Security **(1999)** 53 ALD 138
Re Langer and Telstra Corporation Limited **(2002)** 68 ALD 762

DECISION

The decision of the agency that the documents of a former councillor of the agency are not 'documents of the agency' for the purposes of the FOI Act and are not, thus, accessible under the FOI Act is set aside. In substitution for that decision I find that the requested documents, if they existed or could be found, are 'documents of the agency' for the purposes of the FOI.

The decision of the agency to refuse access to the requested documents is confirmed. I find that all reasonable steps have been taken to find the requested documents held by a councillor of the agency or by a former councillor of the agency, but they either do not exist or cannot be found.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

20 November 2008

REASONS FOR DECISION

1. This complaint arises from a decision of the Shire of Kalamunda ('the agency') to refuse Mr Ross Leighton ('the complainant') access to certain documents requested by him under the *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 ('the Property'). In mid 2004, the complainant applied to the agency for an amendment to District Town Planning Scheme No.2 to rezone the Property from Rural to Special Use (Aged Persons Facility). The Council of the agency ('the Council') decided not to initiate the requested amendment.

3. On 9 May 2007, the complainant made a second application to the agency, this time to amend District Town Planning Scheme No.3 to rezone the Property from Special Rural to Special Purpose (Aged Persons Facility) ('the proposed Scheme Amendment') for the purpose of constructing an aged care facility on the Property.

4. On 9 July 2007, the Planning Services Committee ('the Committee') of the agency considered the proposed Scheme Amendment. The relevant officer of the agency recommended to the Committee that the proposed Scheme Amendment proceed but the Committee voted against that recommendation. Subsequently, the Council, at its Ordinary Council Meeting held on 16 July 2007, resolved not to initiate the proposed Scheme Amendment.

5. On 18 January 2008, the complainant's lawyers applied under the FOI Act to the agency - on behalf of the complainant - for access to documents relating to the proposed Scheme Amendment and said:

> *"On behalf of our client, we wish to make further application for access to documents under the Freedom of Information Act 1992….We request access to all e-mails or other documents received by* ***Councillor David Sadler or then Councillor Nita Sadler*** *as recipients (or CC or BC recipients) regarding a proposed Scheme Amendment in respect of Pt Loc 707 (32) Gavour Road, Wattle Grove.*
>
> *We limit the scope of the above claim to all* ***documents dated between 1 January 2007 and 19 October 2007****. Further, we* ***do not*** *require any correspondence held by the Shire which is correspondence passing between Councillors and our client, or correspondence passing between Councillors and any agent of our client.*"

6. Following that, by letters dated 24 January 2008, the complainant's lawyers wrote to Councillor David Sadler ('Councillor Sadler') and his wife, former Councillor Nita Sadler ('former Councillor Sadler'), to advise them, amongst other things, that the complainant had made separate access applications to the agency for access to documents relating to the proposed Scheme Amendment

and that several of the complainant's applications were then under external review by the Information Commissioner.

7. In those letters, the complainant's lawyers said:

> *"…we put you on notice that you should preserve all documents and any records of archives of documents which fall within the scope of our client's existing Freedom of Information claims or which otherwise relate to our client's proposed Scheme Amendment….*
>
> *If you have not already done so, you should take immediate action to preserve any electronic data which may be stored on a computer or server that is in your possession or under your control. If you have deleted documents, e-mails or data relating to our client's proposed Scheme Amendment from your computer, the archived copies, or remnant data recording those documents, may still remain on the hard drive of that computer. You should preserve that hard drive and refrain from any action that would destroy the archived data, or data which may be preserved on that hard drive relating to documents sought by our client.*
>
> *We note that section 110 of the Freedom of Information Act 1992 creates obligations on people who may have control of documents, or access to documents, that may become the subject of a Freedom of Information application. These obligations survive beyond a person's term of office as a local government councillor. That is, regardless of whether you continued to be a councillor beyond October 2007, you still have obligations in relation to providing access to documents under the Freedom of Information Act 1992.*
>
> *Our client intends to pursue documents which will reveal the real reasons for his unfair treatment at the hands of the Council of the Shire of Kalamunda to the full extent of the law in order to expose what actually happened. As a person who was a public official at the time this decision was made, you had, and continue to have, obligations to preserve documents which are the subject of Freedom of Information claims, or which may become subject to under Freedom of Information claims."*

8. Section 110 of the FOI Act provides:

> *"**Destruction of documents***
>
> *A person who conceals, destroys or disposes of a document or part of a document or is knowingly involved in such an act for the purpose (sole or otherwise) of preventing an agency being able to give access to that document or part of it, whether or not an application for access has been made, commits an offence.*
>
> *Penalty: $6 000."*

9. On 5 February 2008, the agency's FOI Coordinator wrote to the complainant to acknowledge receipt of the access application and advised as follows:

> "*Cr David Sadler will be contacted, and the documentation requested so that it can be reviewed, and a decision made. Please be aware that your request for documentation held by Mrs Nita Sadler is not possible, as Mrs Nita Sadler is no longer a Councillor, and is therefore not subject to the Freedom of Information Act".*

10. The same day, the former Chief Executive Officer of the agency ('the former CEO') notified Councillor Sadler that the agency had received the complainant's application and asked him to give the agency copies of the documents described in the complainant's access application. The former CEO advised Councillor Sadler that he would be informed of the decision on access prior to any documents being released.

11. I understand that the agency's practice is not to provide councillors with an agency e-mail address. Instead, councillors use their own private e-mail accounts to send and receive e-mails in relation to their duties as councillors and their e-mail addresses are posted on the agency's website as the respective contact addresses for councillors. I understand that Councillor Sadler and former Councillor Sadler shared the same private e-mail address, which was posted on the agency's website as the contact e-mail address for both Councillor Sadler and former Councillor Sadler, at the time she was a councillor. I also understand that e-mails sent to the Sadlers in connection with their duties as councillors were directed to their private e-mail address and that such electronic correspondence would then be held on the Sadlers' home computer.

12. On 6 February 2008, Councillor Sadler wrote to the former CEO and advised that he no longer had "…*any documentation or e-mails, pertaining to the Wattle Grove Application*". Councillor Sadler confirmed that his wife, following her retirement from Council, "*due to limited filing space … destroyed all of the documents she felt we no longer needed, and deleted the unwanted e-mails regarding the same.*"

13. On 28 February 2008, the former CEO wrote to the complainant and said:

> *"… I have been informed by Councillor David Sadler that he does not have any documents or e-mails pertaining to the* [sic] *your client's Gavour Road Application. We therefore refuse access under Section 26 of the Freedom of Information Act 1992, providing notice that all reasonable steps have been taken to find the documents".*

14. Since the former CEO (as the principal officer of the agency for the purposes of the FOI Act) made the decision on access, the complainant could not apply for internal review of the agency's decision, pursuant to s.39(3) of the FOI Act. Consequently, on 25 March 2008, the complainant applied to the Information Commissioner for external review of that decision.

REVIEW BY THE A/INFORMATION COMMISSIONER

15. Following the receipt of this complaint, I obtained the agency's FOI file maintained in respect of the complainant's access application. I directed the agency to provide me with information concerning the agency's policies in relation to the retention and disposal of e-mails sent and received by councillors of the agency; and the training or materials given to councillors on their recordkeeping obligations, in particular in relation to e-mails. On 6 May 2008, the agency provided me with that information.

16. In the course of my dealing with this matter, further information was sought and obtained from the complainant and inquiries were made with both Councillor Sadler and former Councillor Sadler as to whether they held or had held documents of the requested kind and the searches made for those documents.

17. Councillor Sadler provided information in writing to the agency and, at my request, former Councillor Sadler provided me with a signed statement, pursuant to my power under s.72(1)(a) of the FOI Act. Both Councillor Sadler and former Councillor Sadler advise me that they have conducted searches for the requested documents – including searches of their home computer – but that the requested documents are not in their possession or cannot be found.

18. On 6 June 2008, following my consideration of all of the submissions and material then before me, I advised the parties of my preliminary view of this complaint.

19. I invited the parties to reconsider their respective positions and I required the agency to provide me with further information to assist me to determine whether the agency had taken all reasonable steps to locate the requested documents relating to Councillor Sadler.

20. By letter dated 10 June 2008, the complainant accepted my preliminary view that "*…documents held by a Councillor relating to matters under consideration by the Local Government of which the Councillor is a member are documents of that agency for the purposes of the* Freedom of Information Act 1992" but did not accept that documents held by a former Councillor are not 'documents of an agency' for the purposes of the FOI Act and provided me with detailed written submissions on that point.

21. On 16 June 2008, the agency responded to my preliminary view and submitted that, in the event that I decided that "*…out-of-Council meeting e-mails and similar correspondence of Councillors"*, which the agency was not required to retain, are documents of the agency, it would potentially have significant consequences for many local governments in Western Australia, particularly those with fewer resources than the agency to deal with FOI requests.

THE REQUESTED DOCUMENTS

22. The requested documents are:

> *"all e-mails or other documents received by* ***Councillor David Sadler or then Councillor Nita Sadler*** *as recipients (or CC or BC recipients) regarding a proposed Scheme Amendment in respect of Pt Loc 707 (32) Gavour Road, Wattle Grove"* dated between 1 January 2007 and 19 October 2007.

23. In this matter, the agency's decision to refuse the complainant access to the requested documents is a decision in two parts. By the first part - dated 5 February 2008 - the agency refused the complainant access to documents of the requested kind received by former Councillor Sadler. By the second part - dated 28 February 2008 - the agency refused the complainant access to documents of the requested kind received by Councillor Sadler.

PART 1 OF THE AGENCY'S DECISION

24. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to, and in accordance with, the FOI Act.

25. In this case, the agency refused the complainant access to documents that might be in the possession of former Councillor Sadler - as opposed to documents in the agency's possession – because she was no longer a Councillor (and thus an 'officer') of the agency and, consequently, such documents would not be 'documents of the agency' which are subject to the FOI Act.

Documents of an agency

26. The term 'documents of an agency' is defined in clause 4(1) of the Glossary in Schedule 2 to the FOI Act, as follows:

> ***"4. Documents of an agency***
>
> *(1) Subject to subclause (2)* [which is not relevant to this matter], *a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer."*

27. In *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 at [20], Wheeler J, in a decision of the Supreme Court, considered the meaning of the expression 'in possession' in that definition and said:

> *"It is my view that the various statutory provisions … indicate that the better view is that an agency is in possession of documents, so as to make them documents of the agency, when the agency actually physically holds those documents."*

28. The term '*officer'* is defined in clause 1 of the Glossary as follows:

> **" *'officer'*** of an agency includes –

> *(a) a member of the agency;*
> *(b) the principal officer of the agency;*
> *(c) any person employed in, by, or for the purposes of, the agency; and*
> *(d) if the agency is a contractor or subcontractor, a director of the contractor or subcontractor (in addition to the persons referred to in paragraphs (a), (b) and (c);"*

29. In *Re Swift and Shire of Busselton* [2003] WAICmr 7, the former Information Commissioner decided at [13]-[16], among other things, that a person who is formally elected as a councillor of a local government is a member of a local government agency and, therefore, an officer of the relevant local government agency for the purposes of the FOI Act. I agree with that view.

The agency's submissions

30. As I understand it, the agency submits that any documents which might be held by former Councillor Sadler would not be documents of the agency because they would not be documents in the possession or under the control of an officer of the agency.

31. In the alternative, the agency submits that the documents sought by the complainant are not documents that are subject to the agency's mandatory recordkeeping requirements. As a result, the agency submits that those documents are not the property of the agency but, rather, are the property of the councillors or former councillors who may hold them.

32. On 6 May 2008, in support of its submissions, the agency provided me with a copy of the Minutes of a meeting of the State Records Commission of Western Australia ('the SRC'), which was held on 6 November 2003. At that meeting, the SRC considered, among other things, the application of the *State Records Act 2000* ('the SR Act') to the keeping of records by local government councillors. Item 5.5 of those Minutes notes that the Western Australian Local Government Association ('WALGA') agreed with the SRC that the approach would be as follows:

> *"'In relation to the recordkeeping requirements of Local Government elected members, records must be created and kept which properly and adequately record the performance of member functions arising from their participation in the decision making processes of Council and Committees of Council. This requirement should be met through the creation and retention of records of meetings of Council and Committees of Council by the Local Government'."*
>
> *Activities or transactions which stem from the performance of other roles by Local Government elected members that are not directly relevant to the decision making processes of Council or Committees of Council are not subject to mandatory recordkeeping requirements. Accordingly, the creation and retention of records relating to these activities or transactions is at the discretion of the Local Government."*

33. The State Records Office ('the SRO') has published that policy approach as part of its Recordkeeping Plan template for adoption by local government authorities. The agency has adopted the policy in its record-keeping plan.

34. In line with that policy, the agency advised me that it held the very strong view that e-mails sent and received by councillors were the property of those councillors:

> "[Such e-mails] *do not, in our view, constitute a record of Council, as per the minutes of the State Records Commission* [meeting held on 6 November 2003].
>
> *It is those documents which were created and held by Councillors in discussion prior, and indeed after, the Council meeting refusing the rezoning of 32 Gavour Road, that we believe are not accessible under Freedom of Information. While the Shire of Kalamunda has been prepared to provide some Councillor documentation relating to this development, there are still concerns as to whether these documents are actually documents of the Agency."*

The complainant's submissions

35. The complainant submits that documents of a former councillor of a local government agency are documents of an agency and made a number of submissions which I have summarised below:

    1. The definition of 'officer' in clause 1 of the Glossary to the FOI Act can be read to include 'a former officer' because the wording is inclusive rather than exhaustive. The fact that 'officer' is defined to 'include' certain people listed in the definition means that other people may be considered to be officers of an agency under the FOI Act. This is supported by the following:

        (a) The wording of the definition of "documents of an agency" contained in Clause 4(1) of the Glossary which, broadly speaking, states that a document is a document of an agency if it is "*within reach*" of the agency or an officer of the agency. Once a document becomes a document of an agency, there is nothing in the FOI Act which provides that the document ceases to be a document of an agency simply because it passes out of the reach of the agency or a presently employed officer of the agency.

        (b) The classification of a document as a document of an agency should not change if the status of the person in control of that document changes. This would lead to the somewhat absurd conclusion that if former Councillor Sadler were to successfully contest the next Council elections, the requested documents' status as documents of the agency would be re-enlivened. It would also mean that a person's right to access documents under s.10 of the FOI Act could potentially be destroyed by an officer who has possession or control

of the requested documents ceasing to be an officer of the agency, for whatever reason. This interpretation is contrary to the intention and spirit of the FOI Act and represents an unnecessary and radical exemption of documents caught by the FOI Act.

(c) Section 8 of the *Interpretation Act 1984* ('the Interpretation Act') provides:

"A written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect maybe given to every part of the law according to its true spirit, intent, and meaning."

If s.8 of the Interpretation Act is applied to clause 4(1) of the Glossary to the FOI Act, it means that once a document becomes a document of an agency by being in the possession or under the control of an officer of the agency, it does not cease to be a document of an agency simply because that officer's term of office with the agency expires. That view is supported by the judgment of McKechnie J in *Pelka v Sundquist* [2005] WASC 52 at [33] who said:

*"Section 8 of the Interpretation Act is sufficient authority to read "*belongs*" in s.39 (g) of the* [Retail Hours Act 1984] *as encompassing the past tense. A certificate is valid if it specifies that a retail shop "belonged" to a class at a particular time. The interpretation proffered by counsel for the respondent/defendants does not give the law its true spirit, intent and meaning when regard is had to the purpose of s.39 of the Retail Trading Hours Act."*

Pelka's case is authority for the view that "*section 8 can result in an interpretation of a provision to apply the present tense to encompass the past*" and, consequently, that the definition of 'officer' can be interpreted to apply to former officers and that the definition of "documents of an agency" can be interpreted to mean documents that "*are or were*" in the possession or under the control of an officer of the agency.

(d) Moreover, s.18 of the Interpretation Act states:

"In the interpretation of a provision of a written law, a construction that would promote the purpose or object of underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object."

A definition of 'officer' of an agency which includes 'former officer' and a definition of 'documents of an agency' which includes documents "*that are or were in the possession or under the control*

of an officer of the agency" supports the spirit and intent of the FOI Act by maintaining a right of access to documents held by officers of the agency when their term of office expires, they retire or are dismissed. It also gives effect to section 10 of the FOI Act, which is intended to give the public access to documents within reach of the agency and officers of the agency.

2. When a local government sends or receives an e-mail it creates a copy of the e-mail which remains on its computer hard drive and server. That copy of the e-mail is clearly a "document of the agency" for the purposes of the FOI Act. Whilst the designation of the officer might change, the designation of the document does not. That copy of the e-mail was a "document of the agency" when created and continues to be a document of the agency. Any other view would have significant implications for the proper administration of the FOI Act, because:

   (a) The documents sought by an applicant under the FOI Act may be held by an officer of the agency but if that officer ceases to be an officer of the agency after the applicant has made an application for access to documents but before a decision on access is made by the agency or Information Commissioner, the applicant would lose his or her right to access those documents.

   (b) Former officers of agencies who have been guilty of breaches of duty or misconduct in the administration of the FOI Act during their terms of office cannot be dealt with by the Information Commissioner under s. 63(3) of the FOI Act.

   (c) Officers of an agency who leave the agency lose their protection under s.104 (defamation or breach of confidence) and s.107 of the FOI Act (for failure to comply with Division 3 of Part 2 of the FOI Act) during their term of office.

Consideration

36. I have carefully considered the submissions of both the agency and the complainant.

37. I do not accept the agency's submission that, since it is not obliged to retain documents of the kind requested, those documents - if retained and held by a councillor - are the property of that councillor. In my view, although the policy published by the SRO and adopted by the agency sets out the kind of document that must be retained by the agency and allows the agency discretion as to whether or not other kinds of document will also be kept, that policy is not decisive of the question as to whether a document is a 'document of the agency' for the purposes of the FOI Act. In my opinion, that question falls to be decided under the FOI Act. As noted, clause 4(1) of the Glossary to the FOI Act states that a 'document of an agency' is a document which:

   - is in the possession or under the control of the agency;

- the agency is entitled to access;
- is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.

38. Consequently, the agency may hold a document that it is not required to retain but, because that document is in the possession of the agency, it will be a 'document of the agency' for the purposes of the FOI Act. In other words, the question of what records an agency is required to retain is a matter for the SRC under the SR Act, but the question of whether documents held by an agency or its officers are accessible under the FOI Act, fall to be decided by that statute.

39. Both parties accept that former Councillor Sadler was a councillor - and, thus, an officer - of the agency. I understand that former Councillor Sadler ceased to be a councillor of the agency in mid-October 2007, which was three months before the complainant applied to the agency under the FOI Act for the requested documents. The question for my determination is whether, at the time that the complainant applied to the agency, he had a right of access to documents held by former Councillor Sadler.

40. I have considered the complainant's submissions and I accept that the definition of 'officer' in clause 1 of the Glossary is inclusive, rather than exhaustive. However, I do not accept the complainant's submission that the definition extends to include a former officer. I note that none of the classes of officer referred to in paragraphs (a) to (d) of that definition refers to a former member, employee, officer or director. Elsewhere in the FOI Act, where it is intended that former office holders be included, express language is used (for example, in clause 3(3) of Schedule 1, which refers to a person "…*who is or has been an officer of an agency*" and in clause 3(4) which refers to "… *a person who performs, or has performed, services for an agency*").

41. In *Salaries and Allowances Tribunal v West Australian Newspapers Ltd* [2008] WASC 39, Martin CJ said, when considering a question about the meaning and interpretation of words or phrases used in the FOI Act:

> "*In my opinion, the question at issue is sufficiently answered by applying the primary approach to statutory construction, which is the application of the natural and ordinary meaning of the words used in the statute to the particular provision of the statute, having regard to that provision in the context of the statute read as a whole, and the objects and purposes of the statute to be inferred from the statute as a whole."*

42. In my view, the views expressed by Martin CJ are apposite to the matter before me. When one has regard to the natural and ordinary meaning of the term 'officer', as defined in the Glossary to the FOI Act, there is nothing which implies, as the complainant submits, that the definition is capable of including a former officer of an agency. The complainant's preferred definition of 'officer' would significantly extend the potential scope and operation of the FOI Act to include any person who at any time in the past may have been employed by a government agency or served as an elected member. Had that been the

intention of the Parliament of Western Australia, I consider that express words to that effect would have been used.

43. I do not accept the complainant's submission in 1(a) that once a document is "*within reach"* of the agency or an officer of the agency it will always thereafter remain a document of the agency. The FOI Act clearly defines in clause 4(1) of the Glossary what constitutes a document of an agency. A document will either come within that definition or it will not.

44. The complainant submits that section 8 of the Interpretation Act favours an interpretation of the term 'officer' in the Glossary of the FOI Act which includes former officers. The complainant cites the decision in *Pelka* in support, where McKechnie J interpreted the present tense of the verb 'belongs' in s.39(g) of the *Retail Hours Act 1984* to include the past tense 'belonged'. I do not consider the *Pelka* decision to be persuasive given that that decision construed a different statute in a criminal context.

45. Moreover, s.8 of the Interpretation Act refers to *"a matter or thing expressed in the present tense"*. A tense is a form taken by a verb to indicate the time of an action. Thus, in *Pelka*, the court considered that the present tense of the verb 'to belong' encompassed its past tense 'belonged'. However the complainant appears to be arguing that s.8 should be applied to the noun 'officer' so as to give it the additional meaning of 'former officer'. In my view, such an interpretation of s.8 is erroneous.

46. Nor am I persuaded that the true spirit, intent and meaning of clause 4(1) of the Glossary intends that it be read to encompass documents that "*are or were*" in the possession or under the control of an officer of an agency because to do so would be a nonsense where 'were' means that such documents were once in the possession or control of an officer but are no longer.

47. Further, with regard to the complainant's submissions on the application of s.18 of the Interpretation Act, I do not consider that s.18 was intended to provide a means of effectively re-writing the provisions of a statute. In my view, the preferred approach is that of Martin CJ in the *Salaries and Allowances Tribunal* case.

48. With regard to the complainant's submission in 2 above, I accept that documents which are sent to and from a local government's computer, and are retained on that computer, are documents of the agency. In response to the complainant's submissions in 2(a) – (c), I note that applicants would not lose their rights to access documents held by a former officer of an agency where the agency is entitled to access those documents. Moreover, in the event that a former officer of an agency has unauthorized possession of government records, the Director of State Records has power under Part 7 of the SR Act to recover those records.

49. In my view, the application of ss.63(3), 104 and 107 of the FOI Act are not relevant to my consideration of the application of clause 4(1) of the Glossary to the FOI Act in this case where the question for my determination is whether

documents retained by a former officer of the agency - either in hard copy or on that individual's private home computer - are documents of the agency. That question is answered by considering whether such documents come within the definition in clause 4(1). In the present case, the agency does not have possession or control of documents which might be held by former Councillor Sadler either in hard copy or in electronic form on her private home computer. In addition, such documents, if they existed, are not held by an officer of the agency in her capacity as such an officer. The remaining question is whether the agency is entitled to access such documents.

50. In *Re Price and Nominal Defendant* (1999) 5 QAR 80, the Queensland Information Commissioner considered the meaning of s.7 of the *Freedom of Information Act 1992 (Qld)*, which is similar in wording to clause 4(1) of the Glossary to the FOI Act. In that case, the Information Commissioner said, at p.89:

> *"A document not in the physical possession of the agency will nevertheless be a "document of the agency" for the purposes of the FOI Act, if it is under the control of the agency (or under the control of an officer of the agency in the officer's official capacity). Included in the concept of documents which are under the control of an agency are documents to which the agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. The words "under the control" convey the concept of a present legal entitlement to control the use or physical possession of a document, as exists in the case of documents held on behalf of a principal by the principal's agent, or documents held by a bailee on behalf of the owner of the documents. In the context of the obligations placed on an agency, by the FOI Act, in respect of "documents of the agency … I consider that, for a document to be one which is under the control of an agency (or one in respect of which an agency is entitled to access), the agency must have a present legal entitlement to take physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations under the FOI Act in respect of the document.)"*

I agree with that view.

51. This issue has arisen on three occasions in the past for determination by the Information Commissioner: see *Re Gallop and Ministry of the Premier and Cabinet* [1996] WAICmr 65; *Re Miles and Electricity Corporation* [1999] WAICmr 31; and *Re Black and Electricity Corporation* [1999] WAICmr 33. Those cases all involved documents held by former contractors of agencies, so that any entitlement to access was governed by the terms of the relevant contract between the former contractor and the agency.

52. The *Local Government Act 1995* ('the LG Act') section 2.10 sets out the role of councillors of local governments. A councillor:

(a) represents the interests of electors, ratepayers and residents of the district;
(b) provides leadership and guidance to the community in the district;
(c) facilitates communication between the community and the council;
(d) participates in the local government's decision-making processes at council and committee meetings; and
(e) performs such other functions as are given to a councillor by the Local Government Act or any other written law.

53. Documents which constitute a record of the performance of any of the abovementioned roles, and that are created or received by a councillor in his or her official capacity as an elected representative, are, in my view, documents of an agency for the purposes of the FOI Act.

54. Section 5.41 (h) of the LG Act requires the CEO of a local government to ensure that records and documents of the local government are properly kept for the purposes of that Act or another written law. In addition, the SR Act provides a comprehensive scheme for the keeping of official government records including the records of local government authorities. Part 7 of the SR Act provides a mechanism for the recovery of government records in the unauthorised possession of any person (sometimes referred to as "estrays").

55. I accept the complainant's submission in 1(b) that the fact that a person who was a councillor ceases to hold that office does not of itself change the classification of official records created or received by that person in his or her official capacity at the time that person held office as a councillor. In other words, such documents, if they exist, continue to be official government records.

56. The definition of documents of an agency in clause 4 of the Glossary to the FOI Act encompasses documents to which an agency is entitled to access, even where the documents are not in the actual possession or custody of the agency. The question for my determination in this case is whether the agency is entitled to access the requested documents in the hands of a person who is a former councillor but who is no longer an officer of the agency because she no longer holds office as an elected member.

57. In my view, having regard to the obligation of CEOs under the LG Act in relation to records and documents of local governments, and to the provisions for recovery of government records under Part 7 of the SR Act, the agency in this case would have power to request a former councillor to deliver to it any records of the agency which it believed were held by the former councillor. If necessary, the CEO of the agency could also ask the Director of State Records to exercise her powers under Part 7 of the SR Act to direct the delivery of such documents to the Director. As a result, I consider the agency has a present legal entitlement to access the requested documents, if they existed. The requested documents are therefore documents to which the agency is entitled to access for the purposes of the definition of documents of an agency in clause 4(1) of the Glossary to the FOI Act.

58. I also note that former Councillor Sadler has advised me in writing, pursuant to my power under section 72(1) of the FOI Act, that she has searched for the requested documents but cannot locate them. For the reasons set out below, I am of the view that all reasonable steps have been taken to find the requested documents but that they do not exist or cannot be found.

PART 2 OF THE AGENCY'S DECISION – SECTION 26

59. The complainant sought access to "*all e-mails or other documents received by Councillor David Sadler …"* relating to the proposed Scheme Amendment and dated between 1 January 2007 and 19 October 2007. The agency refused the complainant access to those documents pursuant to section 26 of the FOI Act on the ground that those documents did not exist.

60. It is not disputed that Councillor Sadler is currently a councillor and, thus, an officer of the agency. In my view, unless it is clear on the face of a particular document that it was received by Councillor Sadler in his capacity as a private citizen rather than in his capacity as a councillor, documents of the kind requested by the complainant that are held by Councillor Sadler are documents in his possession or under his control in his capacity as an officer of the agency. Therefore, such documents would be documents of the agency, to which the FOI Act applies.

61. Section 26(1) of the FOI Act deals with an agency's obligations when it is unable to locate documents sought by an access applicant or when those documents do not exist and provides as follows:

> *"26. (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."*

62. I do not consider that it is my function or that of my staff to physically search for documents on behalf of a complainant. Provided I am satisfied that the requested documents exist, or should exist, then I consider my responsibility is to inquire into whether the agency has taken all reasonable steps to find the documents and to require the agency to conduct further searches, if necessary.

63. When dealing with an agency's decision to refuse access to documents pursuant to s.26 of the FOI Act, there are two questions that must be answered. The first

question is whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where the first question is answered in the affirmative, the second question is whether the agency has taken all reasonable steps to find the documents.

The complainant's submissions

64. In brief, the complainant's lawyers made the following submissions, in their letters to me of 10 June 2008 and 10 October 2008:

- The Shire's searches for e-mails should include "*e-mails **sent from the Sadlers to other Councillors*** (my emphasis)*… as well as e-mails received by the Sadlers from other Councillors of the Shire. Copies of these e-mails may be held by those other Councillors. Those copies fall within the scope of our client's request. The Shire should require all Councillors, and not just the Sadlers, to hand over documents which fall within the scope of our client's request…"*

- In *Chu v Telstra Corporation Ltd* [2005] FCA 1730 at [35], the Federal Court said, in relation to the equivalent of s.26 in the *Freedom of Information Act 1982* (Cth):

  > *"A person requesting access to a document that has been in that agency's … possession should only be able to be denied on the section 24A (of the Commonwealth FOI Act) ground when the agency … 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 … to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered or disorganised*." In light of that test, the complainant submits that the agency has not conducted "all reasonable searches".

- The "*requirements of reasonableness*" are analogous to the law of discovery where it is common practice for detailed forensic examination of computers to be undertaken and the courts can order more detailed forensic searches to be made. The primary reason for discovery is to give the parties and the court access to all documents relevant to the dispute, so that justice can be done. The primary objects of the FOI Act are to ensure that government is open and accountable and to provide public access to documents. Those objects will not be achieved where agencies are able to refuse to conduct forensic searches which are likely to reveal documents subject to the FOI Act.

- Whether or not a search is reasonable in the circumstances will depend on many factors including the likelihood of finding relevant documents; the nature and cost of the search; the number and complexity of documents being sought; the number of locations to be searched; and the likely benefit to be obtained from discovery of the documents.

- The agency should "*conduct a forensic analysis of Councillor David Sadler's computer to determine that all documents falling within the scope of our client's application have been identified and properly assessed against the FOI Act*" because:

  (i) At the time that the e-mails were deleted from the home computer used by the Sadlers, both Councillor Sadler and former Councillor Sadler were of the mistaken belief that those e-mails were not records of the Shire for the purposes of the FOI Act, as advised by the former CEO. However, those documents are documents of the agency.

  (ii) In circumstances where councillors or former councillors have deleted e-mails under a mistake as to the correct position at law, it is reasonable to conduct more thorough and forensic searches for these e-mails because such deletion would not have happened but for a mistaken belief.

  (iii) Councillors who are aware that e-mails sent to, and received by, them are documents of the agency for the purposes of the FOI Act and the SR Act would be likely to take positive steps to ensure that those e-mails are included in the Shire's Record Keeping system instead of deleting them.

  (iv) Former Councillor Sadler advised the complainant's lawyers that the requested e-mails existed on her computer at one time.

  (v) The forensic examination of the Sadlers' home computer would not be a difficult, expensive or onerous task and the complainant has undertaken to pay the reasonable costs of such an examination.

  (vi) The benefit of undertaking a forensic examination of that computer is to discover documents relating to a decision which has a significant impact on the complainant and the local community, which suffers from a dire lack of aged care facilities. It would also ensure that the objects of the FOI Act are achieved.

The agency's searches

65. In response to my request for information as to the searches made for the requested documents, the agency advised me that when dealing with the application:

- it did not initially review documents held within its offices beyond checking for e-mails from Councillor Sadler submitting records to the agency, on the basis that documents held by the agency, including all e-mails to and from staff and councillors, had already been released to the complainant in response to previous FOI applications.

- the Records Officer had reviewed all previously identified documents marked "CC" and "BCC" or which had the names of Councillor Sadler and former Councillor Sadler within the e-mails and which came within the search criteria.

- the Records Officer had reviewed the Central Records System, via the Electronic Document Management System; the electronic file (GV-01/032); and searched using the terms: 32 Gavour Road, Aged Care Facilit*, Rezon* Gavour, Scheme Gavour, Special Elect* and Sadler (in the name field and keywords).

- the Records Officer had searched the hardcopies on file; a working copy of duplicates created by the Executive Manager Planning Services; and all Executive Manager computers and e-mail.

66. However, the agency did not identify any new documents within the scope of the complainant's application which had not already previously been released to him.

67. The agency further informed me it did not search Councillor Sadler's home computer or hard drive for e-mails or deleted e-mail and neither did it search his home for hardcopy documents because the agency does not believe that it has a right of access to Councillor Sadler's personal computer, to his e-mails or to his home.

Consideration

68. I have carefully considered all of the information and material before me, together with the parties' submissions.

69. In my view, the agency's notice of decision did not comply with the statutory obligations placed upon the agency's decision-makers by s.30 of the FOI Act. Section 26(2) provides that the sending of a notice under s.26 is regarded as a decision to refuse access to the requested document. Section 30 provides that if the decision is to refuse access to the requested document, the notice of decision has to include, among other things, the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based.

70. In *Re Doohan and Police Force of Western Australia* [1994] WAICmr 13 at [29], the former Information Commissioner said that when an agency advises in a notice of decision that it is unable to locate requested documents:

> *"…an adequate statement or reasons may go some way towards reassuring a sceptical applicant. In my view, the minimum requirement is a brief explanation of the steps taken by the agency to satisfy the request. Such an explanation should include the locations searched, why those locations were chosen and a description of how the search was conducted (for example: computer search, manual search of file series, card index checked)."*

71. The agency's notice of decision did not contain information of that kind and on external review I required the agency to explain the steps it had taken to satisfy the request.

72. I do not accept the complainant's submission that the scope of its access application should be extended to include e-mails sent from the Sadlers to other councillors. The scope of the complainant's access application was a request for access to "*…all e-mails or other documents received by Councillor David Sadler.*" I consider that e-mails sent from Councillor Sadler to other councillors are outside the scope of that application. I agree with the view of the Queensland Information Commissioner in *Re Ainsworth and Criminal Justice Commission* (1999) 5 QAR 284 at 295 who relevantly said: "*…an applicant cannot unilaterally extend the terms of an FOI access application at the stage of external review: see Re Robbins and Brisbane North Regional Health Authority (1994) 2 QAR 30 at 36).*"

Are there reasonable grounds to believe the requested documents exist or should exist and are, or should be, held by the agency?

73. As noted in paragraph 12 of this decision, Councillor Sadler advised the former CEO that he was unable to provide the documents to the agency because he "*no longer*" had any documents - including e-mails received - relating to the proposed Scheme Amendment and also that former Councillor Sadler had deleted all such documents from their home computer following her retirement as a councillor of the agency. In my opinion, Councillor Sadler's reference to the fact that he "*no longer*" held documents of the kind requested implies that, at some point in time, he may have held documents of that kind.

74. I note that some of the documents which the agency has previously released to the complainant in response to previous applications made under the FOI Act, clearly indicate that Councillor Sadler received e-mails from various third parties which would come within the scope of the complainant's application. In my view, on the information before me, there are reasonable grounds to believe that the requested documents existed at one time.

75. However, as noted, the agency's recordkeeping policy did not require that Councillor Sadler keep documents of the kind sought by the complainant, so that the deletion of any such documents would not have been in breach of the agency's recordkeeping plan.

76. In addition, there is evidence before me that, at the time when former Councillor Sadler retired from Council in mid-October 2007, all documents held by her and Councillor Sadler in relation to the proposed Scheme Amendment - including all e-mails received by her and Councillor Sadler - were deleted from their home computer. That date was some three months before the complainant applied under the FOI Act for access to such documents.

77. There is nothing before me to contradict Councillor Sadler's advice that the relevant documents were disposed of as described and nothing in the

complainant's submissions persuades me not to accept Councillor Sadler's advice. I also note that both Councillor Sadler and former Councillor Sadler have been fully cooperative with the inquiries made by both the agency and this office. I find Councillor Sadler's advice to be credible and therefore accept that advice that the relevant documents have been disposed of. On the information before me, I consider that there are reasonable grounds to believe that the requested documents did exist but not that they should be held by the agency.

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

78. The agency has conducted searches of its database and of its hardcopy files; has made inquiries with Councillor Sadler; and has reviewed all of the documents of the requested kind previously released to the complainant under the FOI Act. The agency has not conducted its own search of Councillor Sadler's home computer although the complainant considers that it is reasonable for the agency to do so. In fact, the complainant has asked that Councillor Sadler surrender his home computer for forensic examination on the ground that the Sadlers were of the mistaken belief that their e-mail correspondence "*were not records of the Shire for the purposes of the* Freedom of Information Act 1992."

79. I do not accept the complainant's submission that the Sadlers had a mistaken belief as to the correct position, in this case. The agency's policy – approved by the SRC – not to retain documents of the kind requested by the complainant is within the agency's proper discretion. If documents are not legally required to be kept and are not kept, then a decision to dispose of them cannot be a "*mistaken belief*" as to the correct legal position. It is only when documents - that are required by law to be retained - are not retained, that a question arises as to whether their disposal might be a mistaken belief as to the legal position in respect of retention.

80. I consider that the agency's recordkeeping policy placed no obligation on either Councillor Sadler or former Councillor Sadler to retain documents of the kind sought by the complainant and, consequently, the decision to delete or dispose of those documents was made in accordance with the agency's policy and not under any mistaken belief concerning it.

81. Nor do I agree with the complainant's submission that the process of discovery during litigation before the courts is analogous to the process contained in s.26(1) of the FOI Act, which requires agencies to take all reasonable steps to find documents the subject of an access application. The litigation process before the courts is an adversarial process between the parties to that litigation and the courts have powers under the applicable Rules of Court to, amongst other things, order private citizens to give discovery of documents, including documents containing private information held on personal computers.

82. By contrast, the external review processes set out in Part 4 of the FOI Act establish an independent, objective administrative review process in which the rules of discovery have no application. The Information Commissioner has no power under the FOI Act to order or direct an agency or a complainant to give the other party "discovery" of any documents. The discovery and inspection

processes of the courts are not part of the FOI external review process because, among other things, section 70(2) of the FOI Act provides that proceedings under the FOI Act 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 the Information Commissioner permit and that the Information Commissioner is not bound by rules of evidence.

83. I do not accept the complainant's submissions that because the requested documents relate to a matter of interest to both the complainant and the community, and because he is willing to pay the costs of a forensic examination of Councillor Sadler's home computer, such an examination should be conducted. The proper question for my determination is, rather, whether the requirement under s.26(1) for the agency to take 'all reasonable steps' to find the documents is satisfied without such an examination.

84. The complainant refers me to the decision of the Federal Court in *Chu*'s case where the court commented - in relation to the corresponding provision in the Commonwealth FOI Act - that an agency, in taking the necessary steps to find a requested document, must in some circumstances overcome inadequacies in its searches and that the relevant provision is not meant "*to be a refuge for the disordered or disorganised.*" I am not persuaded that that issue is directly relevant to the present case because I do not consider that the agency's searches and inquiries disclose that there were demonstrated inadequacies in its attempts to locate the documents.

85. In *Chu*, the Federal Court, at [14], considered that the question of whether or not "*all reasonable steps*" had been taken to locate documents was a judgment to be made by the relevant decision makers and was not a question, ultimately, for the Federal Court. In other words, that question is a question of fact for the decision-maker. Consequently, I consider that, on external review, the judgment as to whether all reasonable steps have been taken to locate the requested documents is a judgment for me to make, based on the circumstances and the material before me.

86. I agree in general terms with the complainant's submission that whether or not a search is reasonable in the circumstances will depend on a number of factors. However, I do not agree with all of the factors cited by the complainant. For example, I do not think that the likelihood of finding relevant documents or the likely benefit to be obtained from the ultimate disclosure of the documents are relevant factors in determining whether or not all reasonable steps have been taken by an agency to identify documents.

87. In *Re Oset and Health Department of Western Australia* [1995] WAICmr 14 at [17], the former Information Commissioner said, in relation to s.26 of the FOI Act:

> "*As I have said before … the adequacy of efforts made by an agency to locate documents the subject of an FOI application are to be judged by having regard to what was reasonable in the circumstances*".

88. The former Information Commissioner also said, in *Re Boland and City of Melville* [1996] WAICmr 53 at [27]:

> *"The agency is not required by the FOI Act to take every possible step to locate a document; it is required, rather, to take all reasonable steps."*

I agree with those views.

89. In *Re Cristovao and Secretary, Department of Social Security* (1999) 53 ALD 138, Deputy President McDonald of the Administrative Appeals Tribunal ('the AAT'), provided the following analysis of the corresponding provision in the Commonwealth FOI Act to s.26 of the FOI Act:

> "*(19) The requirements of s 24A of the FOI Act are twofold, namely, reasonable steps must have been taken to find the document and that the document is in the possession of the Agency but cannot be found or, alternatively, does not exist. The* Shorter Oxford English Dictionary *provides a number of meanings for the verb to 'find', the most apt of which for present purposes is 'to discover or attain by search or effort'. The* Macquarie Dictionary *similarly provides amongst the meanings given to the verb 'to learn, attain or obtain by search or effort'. The* Shorter Oxford English Dictionary *provides five meanings for the word 'reasonable', or which the following is, in the opinion of the tribunal, most appropriately applied:*
>
> *'... 4. Not going beyond the limit assigned by reason; not extravagant or excessive; moderate. ME. b. Moderate in price; inexpensive 1667. 5. Of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose. late ME. (b. Of a fair, average, or considerable amount, size, etc - 1726.*"
>
> *The* Macquarie Dictionary *provides four meanings, including 'moderate; or moderate in price ...'. The Tribunal notes the requirement in s.24A that 'all reasonable steps' (emphasis added) are to be taken to find any requested document.*"

90. I also note the comments made by Deputy President Forgie of the AAT in *Langer and Telstra Corporation Limited* (2002) 68 ALD 762 at [95], after referring to the above observations in *Re Cristovao*:

> *"It seems to me that the first limb of s. 24A requires that the Department take such steps to discover the requested documents as are appropriate in the circumstances. The circumstances that are relevant in determining the steps that are appropriate include the subject matter of the documents sought, the file management systems, any destruction schedules followed in Telstra and the steps that have already been taken to locate documents within the terms of the request."*

91. I agree with the views expressed in *Re Cristovao* and *Re Langer*, above, and adopt them for the purpose of this decision.

92. In the present case, I consider that the agency's searches and inquiries have been both thorough and reasonable. In response to my request for further information about the initial searches undertaken by the agency, the former CEO directed the Records Officer to review the earlier searches and to undertake further steps. As a result, the agency confirmed that no new documents (other than the documents previously released to the complainant by the agency) had been located. In addition, Councillor Sadler has conducted a search of his records - including his computer - and has found no documents which fall within the scope of the complainant's access application.

93. For the following reasons, I am not satisfied that it is reasonable to require the agency to access Councillor Sadler's home computer in order to subject the hard drive to forensic examination to see whether deleted documents are recoverable or accessible.

94. Clause 1 of the Glossary to the FOI Act defines 'document' to mean:

> (a) any record;
> (b) any part of a record;
> (c) any copy, reproduction or duplicate of a record; and
> (d) any part of a copy, reproduction or duplicate of a record,

and also defines 'record' to mean:

> *"… any record of information however recorded* [including] *the following:*
> …
> *(f) any article on which information has been stored or recorded, either mechanically, magnetically or electronically."*

95. I understand from the definition of 'record' that - for the purposes of the FOI Act - a computer or its hard drive is a 'document'. In effect, the complainant is asking for access to information in electronic form which may be held on the hard drive of Councillor Sadler's home computer.

96. The complainant submits that I cannot properly find that all reasonable searches have been undertaken until such time as Councillor Sadler's computer has been checked. The complainant's submissions appear to be based upon the belief that a forensic search of Councillor Sadler's computer will reveal information of the requested kind on the hard drive of that computer.

97. In light of the searches and inquiries made by the agency; the fact that the agency was not required to retain the requested documents; and in the absence of any evidence that raises doubts as to the *bona fides* and veracity of the searches undertaken by Councillor Sadler and the agency, I am not persuaded that it is reasonable to require Councillor Sadler to produce his home computer to the agency or to me for the purpose of a forensic search by an information technology expert, in order to determine whether other documents exist.

98. I consider the agency's searches and inquiries to find the requested documents constitute 'all reasonable steps' in the circumstances of this case. In my view, requiring the agency to conduct a forensic examination of Councillor Sadler's home computer is excessive and goes beyond the limit required by reason. In my view, where officers are authorised to delete electronic documents and do so, agencies should not be required as a matter of course to conduct searches for that electronic information from the hard drives of computers under the FOI Act.

99. In my view, 'all reasonable steps' to find documents might include a forensic examination of an agency's or councillor's computer if there was evidence to suggest that electronic information had been deleted in order to prevent an agency from giving access to it. However, there is no information of that kind before me or any suggestion that s.110 of the FOI Act applies in this case.

100. Having considered the submissions of the complainant; the advice of Councillor Sadler, former Councillor Sadler and the agency; the inquiries undertaken by my officers; and the recordkeeping obligations of the agency and its officers as they apply to documents of the requested kind, I consider that the agency has taken all reasonable steps to find the requested documents but that such documents do not exist or cannot be found.

CONCLUSION

101. I find that the requested documents, if they existed or could be found, are 'documents of the agency' for the purposes of the FOI.

102. I also find that, in the circumstances, all reasonable steps have been taken by the agency to find the requested documents but they do not exist or cannot be found. Accordingly, I confirm the agency's decision to refuse the complainant access to the requested documents under s.26 of the FOI Act.

****