

**CAMBRIDGE AND PERTH**

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

**File Ref: 96154  
Decision Ref: D00297**

Participants:

**Town of Cambridge**  
Complainant

- and -

**City of Perth**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - deemed refusal of access - documents relating to decision to surrender to the Crown land known as Bold Park - section 26 - access refused because documents either do not exist or can not be found - whether reasonable grounds to believe that documents exist or should exist - sufficiency of searches.

*Freedom of Information Act 1992 (WA) s.26.*

*City of Perth Restructuring Act 1993 (WA) s.24.*

## DECISION

The decision of the agency to refuse access to the requested documents, in accordance with s.26 of the *Freedom of Information Act 1992*, on the ground that they either do not exist or cannot be found, is confirmed.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

24th January 1997

## REASONS FOR DECISION

### BACKGROUND

1. This is an external review by the Information Commissioner arising out of a decision of the City of Perth ('the agency') to refuse access to documents requested by the Town of Cambridge ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act'). The agency claims it is not possible to give access to the documents because they either do not exist or cannot be found.
2. On 1 July 1994, the municipal district of the former City of Perth was divided into four municipal districts, being the agency, the complainant, and the Towns of Shepperton and Vincent. A Commission comprising five Commissioners was appointed to be regarded as the council for each of the new towns and the agency until the commencement of the first properly constituted meeting of an elected Council of each of the four municipalities. It is my understanding that under s.24 of the *City of Perth Restructuring Act 1993* all of the land previously held as endowment lands owned by or vested in the former City of Perth was transferred to, and became the property of, or vested in the complainant.
3. By a Council resolution dated 13 December 1994, the agency transferred the land comprising the Bold Park Land Holdings to the complainant. The Department of Local Government and the Department of Land Administration coordinated the preparation of the necessary paperwork relating to the transfer of the land and the signing by Governor's Order. The formal transfer of that land was recorded and published in the Government Gazette dated 3 March 1995.
4. By letter dated 31 January 1996, the complainant applied under the FOI Act for access to all documents of the agency relating to the transfer of Endowment Lands from the agency to the Crown for the years 1993, 1994 and 1995. The agency provided full access to 309 documents it had identified as coming within the ambit of the complainant's access application.
5. By letter dated 5 August 1996, the complainant sought an internal review of that decision on the basis that access to all the requested documents had not been provided. In particular, the complainant claimed it had not been provided with access to documents recording the entry into the agreement by the Commissioners on behalf of the complainant in respect of Bold Regional Park on or around 3 May 1995, nor had it been provided with access to documents recording considerations or deliberations leading up to that decision, either on the agency's part or that of the State.
6. In a letter dated 28 August 1996, the principal officer of the agency confirmed that access had been provided to all of the documents the agency had identified as being within the ambit of the complainant's access application. Accordingly, the agency confirmed its deemed refusal of access under s.26 of the FOI Act to

the documents described by the complainant in its request for internal review on the ground that those documents either do not exist or cannot be found.

7. By letter dated 15 October 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision to refuse access to those documents pursuant to s.26 of the FOI Act.

## **REVIEW BY THE INFORMATION COMMISSIONER**

8. I obtained a copy of the agency's FOI file maintained in respect of this matter. My Investigations Officer met with the FOI Coordinator of the agency and obtained advice in respect of the agency's records and records created in respect of the three new towns. My officer also met with the principal officer of the agency to obtain further information in respect of this matter. I also obtained copies of the documents to which access had been granted.
9. After considering the material before me, I informed the parties in writing of my preliminary view and reasons for that view. Based on the material before me, it was my preliminary view that the requested documents either did not exist or could not be found. I also considered that the agency had taken all reasonable steps to locate those documents and I did not require further searches to be conducted.
10. On 20 January 1996, I was informed by solicitors for the complainant that no further submissions would be made in response to my preliminary view but the complainant would not withdraw its complaint. Consequently, I must determine this complaint by way of a formal decision in accordance with my statutory duty.

## **REFUSAL OF ACCESS - SECTION 26 OF THE FOI ACT**

11. Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate the document sought by an access applicant. Pursuant to s.26 of the FOI Act, access may be refused on the ground that a document either does not exist or cannot be found. Section 26 provides:

### ***“Documents that cannot be found or do not exist***

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”.*

12. I have previously expressed the view that, when dealing with a complaint concerning a decision of an agency to refuse access on the ground that documents either do not exist or cannot be found, there are two questions that must be answered. The first of those is whether there are reasonable grounds to believe that those documents exist or should exist, and are, or should be, held by an agency. In the circumstances in which the first question is answered in the affirmative, the second question, in my view, is whether the agency has taken all reasonable steps to find the documents.

**Do the documents exist or should they exist?**

13. The documents to which access is sought by the complainant concern the decision taken by the Commissioners on behalf of the complainant to surrender to the Crown the land commonly known as Bold Park which lies within the boundaries of the agency.
14. It is my understanding that the issue of Bold Park has been a contentious one and its management has been the subject of official discussions over a long period of time. I am informed by the agency that after 13 December 1994 all dealings with the land comprising Bold Park would have been carried out by the complainant, even though the formal transfer of that land did not take place until 3 March 1995, and that preliminary meetings held to discuss land within the boundaries of the complainant would also have occurred with staff employed by the complainant.
15. The agency informs me that it provided services from 1 July 1994 to the three towns, but that the day to day decision-making in relation to the activities within the towns, particularly those relating to the land within the towns, was overseen by the administrations of the newly-created towns at that time.
16. I have examined copies of the 309 documents to which access has been granted by the agency. The minutes of the meetings of the council of the former City of Perth conducted throughout 1993, together with associated documentation, record in some detail the steps taken and the considerations in respect of the future of Bold Park, culminating in the council’s decision of 15 November 1993 to accept the preferred Structure Plan 6.4 proposed by Mitchell McCotter in the draft Public Environmental Review.

17. However, the notes of the meetings of the Commission provide no details of the discussions of the Commissioners, other than noting that Bold Park was discussed. Some decisions concerning the matter are recorded, although not the decision to make a gift of the land, but none of the discussions leading to, or the reasons for, each decision is recorded. Some indication of the particular issues that were being considered by the Commissioners may be gained from some documents released to the complainant, including the notes of a meeting between, *inter alia*, the Chairman of Commissioners and the Minister for Planning and another Minister on 31 May 1994, from which it appears that, at that stage, the decision to make a gift of the land to the State Government had not been made. In an unsigned copy of a letter dated 13 January 1995 from the Chairman of Commissioners to the Premier, already released to the complainant by the agency, the following statement appears:

*“I wish to confirm that the Commissioners have agreed that the land comprising the proposed Regional Park will be “gifted” to the Government of Western Australia. The agreement to “gift” the land has not been formally resolved by the Commissioners, acting in their capacity as the Council of the Town of Cambridge, however, the “gifting” can proceed once the Bold Regional Park proposal has been adopted by Cabinet”.*

18. However, of all the documents provided to the complainant, none details any of the deliberations of the Commissioners concerning the issue of Bold Park nor records the decision to give the land to the State as a gift, nor the reasons for the decision. I consider that it would be reasonable to expect some documentary record of those matters, as there was of the council’s deliberations in 1993, even if such a record was less formal than the council minutes.

**Has the agency taken all reasonable steps to locate the documents?**

19. The agency informed my office that, during the process of creating the three new towns, new files pertaining to each of those towns were created and those files were maintained by the agency within its centralised record storage system. The files managed by the agency for the complainant for the period 30 June 1994 to 30 June 1995 were then physically re-located when the agency moved to its new office. Accordingly, those files are in the possession of the complainant and are no longer documents of the agency. I also understand that all of the files prior to June 1994 remain in the possession of the agency as documents of the agency.
20. My Investigations Officer visited the offices of the agency and was given a demonstration of the searches undertaken by the agency to locate the documents. Those searches were made on the agency’s computerised data base using “Bold Park” as a prompt. All of the files identified as containing documents relevant to the access application were physically searched and, from those, 309 documents were located and the complainant was given access to all of those documents. Inquiries were also made with a number of individuals, but no documents were located. Searches were made in the offices of the current principal officer of the

agency and a search was made among the remaining papers of the former principal officer with no result.

**Conclusion**

21. Although I consider that it is reasonable to expect that documents of the particular type sought by the complainant should exist, there is no evidence before me that they do, in fact, exist, or have ever existed. Further, I consider the searches undertaken by the agency to locate documents of the kind requested have been thorough and that the agency has taken all reasonable steps to locate them. Accordingly, I find that the decision of the agency to refuse access to those documents, pursuant to s.26 of the FOI Act, on the ground that they either do not exist or cannot be found, was justified.

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