

NAZAROFF AND CALM

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

**File Ref: 94136
Decision Ref: D00895**

Participants:

**Harry Nazaroff
Manya Mike Nazaroff
Diane Harry Nazaroff**
Applicants

- and -

**Department of Conservation and Land
Management**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents containing legal advice between the agency and its solicitor - clause 7 - legal professional privilege - sufficiency of search by agency - additional searches - additional information - integrity of searches - time constraints under FOI Act - allegations of deliberate destruction of documents - unreasonable to require interpretation/explanation of documents.

Freedom of Information Act 1992 (WA) ss. 13(1)(b); 26; 30; 68(1); 72(1)(b); 74(2); 75(1); Schedule 1 clauses 3, 7.

Re Weeks and Shire of Swan (Information Commissioner WA, 24 February 1995, unreported).

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44.

Re Doohan and Western Australia Police Force (Information Commissioner WA, 5 August 1994, unreported).

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported).

DECISION

The decision of the agency of 15 November 1994 is varied. It is decided that Documents 1-8 and 10-14, described in paragraph 14 of the reasons for this decision, are exempt documents under clause 7 of Schedule 1 to the *Freedom of information Act 1992*.

Further, it is decided that Document 9 is not exempt and the applicants are entitled to access to that document.

The decision of the agency to refuse access to other documents on the ground that they do not exist or cannot be found is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

March 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Conservation and Land Management (CALM) ('the agency'), to refuse Mr, Mrs and Ms Nazaroff ('the applicants') access to certain documents to which access was sought under the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 8 November 1993, Mr and Mrs Nazaroff requested access to documents of the agency consisting of "*...the whole of our file regarding the planting of Blue Gum trees on our Scott River farm property - Sussex Location 4269. In addition...a copy of our contract signed with CALM dated 3rd July 1989.*"
3. From material before me it appears that, between receipt of this application in November 1993 and October 1994, representatives of the agency met with one or more of the applicants on at least 8 separate occasions and held numerous telephone discussions with them in an effort to comply with their request for access to information. I was informed by the agency, which fact was not disputed by the applicants, that at each meeting the applicants made verbal requests for information and documents, often up to 30 individual requests at a time. Some of those requests were confirmed in writing but others were not. Apparently the agency complied orally with many of those requests for access to information.
4. This process, which took place by agreement with the applicants, occurred despite the statutory time frames in the FOI Act which prescribe the procedures to be followed by agencies in dealing with FOI requests. It also had the effect of complicating the process of external review because the scope of the original access application was widened rather than narrowed.
5. On 14 October 1994, the applicants were advised in writing, by Mark Brabazon, Executive Officer of the agency, that access to the requested documents contained in the agency's file number 027831F4003 entitled "Hardwood Plantations, Land for Hardwood Sharefarming Agreement (Payne)" ('the file') was refused on the ground that those documents were exempt under clause 7 of Schedule 1 to the FOI Act. However, the applicants were granted access to a copy of the contract signed with the agency as well as other documents to which access had been denied in the earlier discussions. In the letter from Mr Brabazon, which purported to be a notice of the decision on access as required by s.13(1)(b) of the FOI Act, the agency also acknowledged that some documents appeared to be missing from that file and could not be found, and others sought by the applicants could not be found and may not have existed.

6. By letter dated 10 November 1994, the applicants sought internal review of the decision of Mr Brabazon to refuse them access, under clause 7 of Schedule 1 to the FOI Act, to certain of the requested documents. In addition, although not specifically stated, access to other documents requested was refused under s.26 of the FOI Act. By another letter, dated that same day, the applicants also requested access to documents described as *"faxed cover sheets and contents of file sent by CALM to GWN"*. Golden West Network ('GWN') is a television station broadcasting to country areas of Western Australia.
7. On 15 November 1994, Mr G Heberle, Scientific Advisor to the Director of Forests, advised the applicants of the outcome of the internal review. He decided to grant them access to some additional documents. However, his decision confirmed the original decision to refuse access to other documents on the ground that those other documents were exempt under clause 7 of Schedule 1 to the FOI Act. On 6 December 1994, Caris Bailey, Acting Executive Officer, confirmed previous verbal and written advice to the applicants that documents that it appeared had been sent by facsimile to GWN were not on the file and copies could not be located within the agency.
8. On 6 December 1994, the applicants applied to the Information Commissioner for external review of the decision to refuse access to documents claimed to be exempt under clause 7 of Schedule 1 to the FOI Act. The applicants also sought an explanation from the Information Commissioner for the alleged destruction of records which, because the agency could not locate the documents apparently sent by facsimile to GWN, they believed had occurred.

REVIEW BY THE INFORMATION COMMISSIONER

9. On 14 December 1994, in accordance with s.68(1) of the FOI Act, I notified the agency that this complaint had been accepted for external review. I did not consider the agency's letters of 14 October and 15 November 1994, which purported to be the notices of decision required by s.13(1)(b), were in the form required by s.30 of the FOI Act and, pursuant to ss. 75(1) and 72(1)(b), I required the production to me of the documents in dispute together with the file maintained by the agency with respect to this FOI request. Those documents were delivered to my office on 19 December 1994.
10. As stated in paragraphs 3 and 4 above, the processes adopted by the agency, and to which the applicants agreed, for dealing with this access application made under the FOI Act were on-going for a period of over 12 months and this complicated my function of external review in this instance. However, during subsequent discussions between the applicants and my office, and following a meeting between the parties held at my office on 30 January 1995, it was confirmed that the complaint to my office concerned two decisions of the agency.
11. Those were, firstly, the decision to refuse access to 14 documents on the ground that those documents were exempt under clause 7 of Schedule 1 to the FOI Act.

The number of documents to which access was refused was originally determined to be 21 as a result of a mistake occurring in the agency's numbering system. After this had been brought to the attention of the agency and the applicants confirmed the exact number of folios to which access had previously been granted, the mistake was corrected. As a result, 14 documents remained in dispute between the parties.

12. The second matter for review concerned the decision to refuse access to other documents on the ground that they could not be found or did not exist. The applicants identified those documents as:
 - (i) the documents sent to GWN accompanying facsimile cover sheets to which the applicants were provided access (folios 41, 43 and 45 from the file);
 - (ii) diary notes and/or file notes relating to telephone conversations from December 1988 to February 1989 between the applicants and various officers of the agency;
 - (iii) minutes of meetings of a smaller technical working group which appears to have been established by the Beenup Working Party;
 - (iv) notes of meetings held during April 1991 between the agency, BHP and Bunnings where the specific subject of those meetings was the applicants' property at Scott River; and
 - (v) file notes in relation to the applicants' Scott River property held by the Busselton, Manjimup and Margaret River offices of the agency.
13. On 22 February 1994, after examining the documents in dispute, the contents of the agency's FOI file and the file, and considering the submissions of the applicants and the agency and a report of my investigating officer, I provided the applicants with my preliminary view, and reasons for that preliminary view, concerning the two matters of complaint before me. It was my preliminary view that all except one of the documents to which access had been refused were exempt documents under clause 7 of Schedule 1 to the FOI Act. Further, it was my preliminary view that the documents described in paragraph 12 above either did not exist or could not be found. The applicants were invited, in light of this preliminary view, to re-consider their complaint. However, they chose to pursue the matter and to make a further submission, which was received in my office on 10 March 1995. That submission did not provide any new evidence to support the applicants' belief that the documents described in paragraph 12 above had been intentionally destroyed by the agency. After concluding that further conciliation was not possible, I proceeded to a formal decision in this matter.

THE DISPUTED DOCUMENTS

14. In the file there are 14 documents to which access has been denied on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. Those documents and their respective folio numbers are described as follows:

No.	Folio	Date	Description
1	281	28/1/93	Copy letter - G. Sommerville to Crown Law Department
2	284-85	4/2/93	Letter - Senior Assistant Crown Solicitor to G. Sommerville
3	286	5/2/93	Copy letter - G. Sommerville to Crown Law Department
4	290	15/2/93	Copy letter - G. Sommerville to Senior Assistant Crown Solicitor
5	306	15/3/93	Letter - Senior Assistant Crown Solicitor to G. Sommerville
6	307	17/3/93	Copy letter - G. Sommerville to Senior Assistant Crown Solicitor
7	-	23/3/93	Note of telephone message from Crown Law Department to G. Sommerville
8	308	23/3/93	File note of G. Sommerville
9	309	-	Copy Notice of Demand from Commonwealth Bank to Manya Mike Nazaroff, and copy certified mail posting receipt, date stamped 8/12/92 of GPO Perth
10	310	22/3/93	Letter - Senior Assistant Crown Solicitor to G. Sommerville
11	317	23/3/93	Letter - Senior Assistant Crown Solicitor to G. Sommerville
12	318	26/3/93	Copy letter - G. Sommerville to Senior Assistant Crown Solicitor
13	337	17/6/93	Letter - Senior Assistant Crown Solicitor to G. Sommerville
14	350	2/9/93	Copy facsimile memorandum from Crown Solicitor to D. Keene

THE EXEMPTION - CLAUSE 7

15. Each of the documents described in paragraph 14 above is claimed to be exempt by the agency under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

"(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Limit on exemption

"(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."

16. As I have said in previous decisions, and most recently in *Re Weeks and Shire of Swan* (24 February 1995, unreported, paragraphs 16-19), the purpose of this exemption is to ensure that a document which would be protected from production in legal proceedings cannot otherwise be obtained under the FOI Act. The doctrine of legal professional privilege is founded on consideration of high public policy. In the joint judgment of Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674 at 685 it was said :

"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."

17. In *Grant v Downs*, the High Court considered whether the privilege attached to reports made by officers of the Health Commission of New South Wales following the death of a patient in a psychiatric hospital. In support of the claim, an affidavit was sworn by an officer of the Health Commission to the effect that the documents concerned were brought into existence for a number of purposes - to determine whether any member of the staff was guilty of breaches of discipline, to detect whether there were any shortcomings in the hospital administration and for submission to the legal advisers of the Health Commission in the event that disciplinary proceedings involving staff arose, or coronial proceedings arose, or in the event that a civil claim arising from the death was initiated against the Health Commission. The High Court unanimously rejected that claim to privilege and held that only those documents which are brought into existence for the sole

purpose of submission to legal advisers for advice or for use in legal proceedings are entitled to immunity from production.

18. After consideration of the matters in issue, Stephen, Mason and Murphy JJ further said, at p688:

"All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate the risk. For this and the reasons we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege."

19. Thus, the test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs*, (*op. cit.*); *Baker v Campbell* (1983) 153 CLR 52.

Do the disputed documents 1-14 meet the "sole purpose test"?

20. I have examined each of the documents described in paragraph 14 above. Except for Document 9 (folio 309), I am satisfied from my examination of the contents of the documents themselves that each is a communication between an officer of the agency and the Crown Law Department. I am also satisfied that they are confidential communications between solicitor and client and I am satisfied that each of those documents was brought into existence for the sole purpose of giving or receiving legal advice.
21. In their submission of 10 March 1995, the applicants stated that they were unable to accept that those documents were exempt under clause 7 of Schedule 1 to the FOI Act because they had no idea to what the documents referred. It was the view of the applicants that the documents should be disclosed for their information as there had not been any mention of any legal proceedings during their contact with the agency.
22. The FOI Act does not require that an agency or the Information Commissioner explain the contents of documents, nor is it possible for me to describe the substance of a confidential communication without breaching my obligations

under s.74(2) of that Act. Consequently, I find that the exemption under clause 7 of Schedule 1 to the FOI Act is established as Documents 1-8 and 10-14 would be privileged from production in legal proceedings on the ground of legal professional privilege.

23. Document 9 (folio 309) is described as a copy of a Notice of Demand addressed to Manya Mike Nazaroff of Paraburdoo from the Commonwealth Bank and is dated 8 December 1992. Attached to it is a copy of a "certified mail posting receipt" indicating it was sent by certified mail to Mrs Nazaroff on 8 December 1992. Document 9 was sent to the agency as an enclosure with document 10. Clearly, the original document from which Document 9 was copied was not a privileged document. It clearly was not a confidential communication between a solicitor and client, and clearly was not created for the sole purpose of giving or receiving legal advice. It was created to be served upon, and appears to have been served upon, Mrs Nazaroff. The question arises whether a copy of an unprivileged document made solely for the purpose of giving or obtaining legal advice or use in litigation is privileged.
24. In *Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44, at 61 and 62, Wood J considering that question, said:

"In my view, it is incorrect to state, as a general proposition, that a copy of an unprivileged document becomes privileged so long as it is obtained by a party, or its solicitor, for the sole purpose of advice or use in litigation. I think that the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research, or the exercise of skills and knowledge on the part of a solicitor, then I consider privilege should apply (Lyell's case). Otherwise, I see no reason, in principle, why disclosure should be refused of copies of documents which can be obtained elsewhere, and in respect of which no relationship of confidence, or legal professional privilege exists.

I see nothing in Grant v Downs or National Employers' Mutual General Insurance Association Ltd v Waind as requiring a different conclusion. Neither of these cases was concerned to distinguish between copies and originals. While it must be accepted by me that the privilege is concerned with the purpose for which a document recording information is brought into existence, a literal application of the principle to mere reproductions is likely to produce absurd and anomalous situations outside the rationale of the principle. In this regard, I respectfully agree with the observation of Clarke J in Vardas (at 661):

"...A rule attaching privilege to copies of non-privileged documents is not within the rationale of the rule underlying the relevant privilege, conducive to expeditious and fair trials, nor consistent with the strict approach for which Grant speaks."

I respectfully agree with those comments and, in the absence of any evidence to the contrary, I do not consider that Document 9 would be privileged from production in legal proceedings and I find that it is not exempt under clause 7.

25. It is apparent from its contents that Document 9 contains certain "personal information" (as defined in the FOI Act) about Manya Mike Nazaroff. Documents containing personal information about a third party may be exempt under clause 3(1) of Schedule 1 to the FOI Act. However, sub-clause 3(5) provides that matter is not exempt under clause 3(1) if the applicant provides evidence establishing that the individual concerned consents to disclosure of the matter to the applicant.
26. Manya Mike Nazaroff is one of the applicants. There is before me written agreement from her consenting to the release of the information in Document 9 to the other two applicants. Therefore, I find that Document 9 is not exempt under clause 3(1) of Schedule 1 to the FOI Act.

REFUSAL OF ACCESS TO DOCUMENTS WHICH CANNOT BE FOUND OR DO NOT EXIST

27. When an applicant claims, as the applicants in this case have claimed, that documents are missing from an agency's record-keeping system, or an agency claims that requested documents cannot be found or do not exist, the function of the Information Commissioner is not to physically search for documents on behalf of the applicant, nor to examine in detail an agency's record-keeping system. The role of the Information Commissioner in those circumstances is to determine whether there are reasonable grounds for believing that the requested documents exist and, if so, to determine whether the searches conducted by the agency were reasonable in all the circumstances, and if necessary to require the agency to undertake further searches.
28. An applicant seeking to exercise his or her right of access under the FOI Act to documents of an agency must, to some extent, rely on the integrity of the search conducted by that agency. If additional documents are located after further searches, it is understandable that in those circumstances an applicant may remain sceptical about the sincerity of the agency's efforts to meet its obligations under the FOI Act in the first instance. However, as I stated in my decision in *Re Doohan and Western Australia Police Force* (5 August 1994, unreported, at paragraphs 28 and 29), I do not believe that the FOI Act requires any agency to

guarantee that its system is infallible. I recognise that requested documents may not be found for a number of reasons including misfiling, poor record keeping, ill-defined requests, a proliferation of record systems within an agency, unclear policies or guidelines, inadequate training in record management, or the documents may simply not exist.

29. However, as I also stated *Re Doohan*, if an agency is unable to locate requested documents, an adequate statement of reasons may go some way towards reassuring an applicant that all reasonable steps have been taken. 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).

The searches conducted by the agency

30. In its efforts to satisfy the applicants' access application, the agency undertook searches in the Bunbury offices of the agency, and also within its own computerised records system in Perth. The agency has confirmed that contacts were made with numerous officers of the agency who had been named by the applicants as being officers with whom the applicants had had dealings. In some cases, the searches revealed additional documents that the agency determined fell within the ambit of the access application, and access to those additional documents was provided to the applicants. The agency has also advised that due to the "satellite" filing systems within the agency, the search for documents the subject of the access application was made more time consuming. The agency has detailed the steps it took to locate the documents the subject of the access application by searching the manual and central computerised records filing system of its Perth offices, and its satellite offices in the south west. I am advised that the agency conducted searches on the computerised records system, on the basis of a number of possible keywords.
31. Whilst the manual filing system of the agency appears to hamper the agency's search for documents that fall within the ambit of the access application, I am satisfied that the agency has completed a thorough review and inspection of the records kept by the agency.

Are there reasonable grounds for believing that copies of documents of the agency were sent to GWN?

32. The applicants have been provided with access to, *inter alia*, copies of 5 documents, namely folios 41, 42, 43 44 and 45 from the file. Folios 41 and 43 are facsimile cover sheets indicating a transmission from the agency to GWN Bunbury and Albany respectively. Folio 41 indicates that 3 additional pages were sent to an employee of GWN Bunbury on 20 January 1990. Folio 43 indicates that 3 pages were sent to GWN Albany on 19 January 1990. Folios 42 and 44 are both dated 19 January 1990 and each confirms the transmission of 3 pages.

Folio 45 is a note containing the name of a GWN employee at Albany and a facsimile number and the name of the chief executive officer of the agency.

33. Based on the information contained in folios 41-45 I am satisfied that there are reasonable grounds for believing that copies of documents of the agency were sent by facsimile in 1990 to GWN at Bunbury and Albany. It appears that the agency also accepts that this occurred. In my view, it may be a prudent practice to retain on file a copy of any documents sent by an agency to another party by facsimile. However, I recognise that this practice may vary from agency to agency and that it appears that it did not occur on this occasion.
34. The efforts of the agency to locate the missing documents consisted of writing to GWN at Bunbury and Albany on 2 February 1994 to inquire whether copies of the transmitted documents could be located. GWN was unable to locate the relevant documents. I am informed by the agency, which fact is not disputed by the applicants, that three letters dated 14 October 1994, 10 November 1994 and 6 December 1994 were sent to the applicants informing them of the results of this search. The agency has also made inquiries with the employee whose handwriting appears on folio 45. That person has no recollection of the documents that were transmitted to GWN and he cannot explain why copies are not on the file. However, he did suggest that one explanation might be that the documents were common publications of some description which were not sufficiently unique to be filed individually. The other facsimile operator is now deceased.
35. Based on the information before me, I am satisfied that the efforts of the agency to locate the documents sent by facsimile to GWN have been reasonable in all the circumstances. The transmission occurred in 1990. After this length of time it would not be unusual for memories of routine happenings to fade and for records to be lost or misplaced. I am also satisfied that the agency has adequately informed the applicants of the extent of the searches and the results of those searches.
36. I was informed by the applicants, in their submission dated 10 March 1995, that they believed the documents sent by facsimile to GWN had been intentionally destroyed. The applicants stated that they had kept a record of their telephone calls to GWN, the first being on 18 January 1990. It appears that the applicants made contact with GWN following a story reported by GWN concerning the planting of blue gum trees in the south-west and the funds available to the agency for further plantings, and including an interview with the Executive Director of the agency, Dr Syd Shea. They claim that the day after that report was broadcast the agency informed them that it had decided there would be no further planting of blue gum trees on their Scott River property.
37. The applicants claim that GWN then made arrangements to interview them, but that subsequently the facsimile transmissions were sent to GWN and the interview did not proceed. The applicants claim to be at a loss to understand why such documents would appear on their file and believe that personal details may have been divulged to a GWN reporter without their consent. Further, the applicants contend that the documents sent to GWN by the agency by facsimile may have

been intentionally destroyed because those documents contained defamatory material about them.

38. As I have stated before, an agency is not required to explain or interpret the contents of its documents to an applicant who seeks access to those documents under the FOI Act. It may choose to do so, but is not required by the provisions of the FOI Act to embark upon this course of action. Neither is an agency required to justify its record-keeping practices to an applicant or to the Information Commissioner. However, it is frequently the case that I seek from an agency an explanation of practices or procedures which are unusual or which do not appear to accord with the requirements of a good record management system, particularly when documents the subject of an access application cannot be located.
39. From my examination of the file, it is my view that the file does not relate solely to the applicants and I would not think it unusual for documents which appear to be unrelated to the applicants or their Scott River property to be found on that file. Whilst I would expect copies of documents sent by facsimile to be filed in sequence on the file, the fact that those documents are missing does not necessarily mean that the conclusions drawn by the applicants are correct. Therefore, I find that there are reasonable grounds for believing that the requested documents exist or once existed and that those documents should be located in the agency's record-keeping system. However, as I have said, I am satisfied that the agency has taken reasonable steps to locate the documents but is unable to provide the applicants with access to them because they cannot be found.

Are there reasonable grounds for believing that there are documents in existence recording conversations between the applicants and officers of the agency between December 1988 and February 1989?

40. In a submission to me, dated 8 January 1995, the applicants said:

"Our original request was for field notes and files from Bunbury, Manjimup, Busselton and Margaret River offices, as per letter 29th December 1993 to Nazaroff's from CALM (page 3)..."

Also letter (copy attached) to Mark Brabazon from Ross Young - dated 3rd July 1994 - we requested copy of Ross Young's diary notes and files that he used to compile this report."

41. I have inspected the applicants' access application under the FOI Act and it did not specifically identify file notes, files from various offices of the agency or diary notes of officers of the agency as being the documents or some of the documents to which access was sought. Further, it appears that the request for access to those particular documents may have originated at one of the many subsequent discussions or meetings between the applicants and the agency. It is also my understanding that the applicants have been provided with access to the file in accordance with their original access application, save for those documents which

are the subject of a claim for exemption under clause 7 of Schedule 1 to the FOI Act.

42. Although I am not persuaded that the requested documents described in subparagraphs (ii)-(v) of paragraph 12 above are within the scope of the original access application, the agency treated them as though they were. I have, therefore, included a consideration of them in these reasons for decision. The agency informed me that personal contact was made with three officers, or former officers, of the agency in an effort to locate diary notes or field notes that were relevant to this part of the applicants' request. None of the persons contacted was able to assist the agency in this regard. It is my understanding that the agency claims that if those documents existed they would be located on the file to which the applicants have been granted access. It is also my understanding that the applicants have been advised in writing of the results of the agency's search and the responses of the persons concerned who were contacted by the agency.
43. It may be that the agency needs to develop a standard policy or practice with respect to the taking and recording of field notes, if that has not already occurred. However, I am aware that the practice of making and filing notes of conversations by officers of agencies, relating to the performance of their duties, varies across the public sector: see also my comments in *Re Read and Public Service Commission* (16 February 1994, unreported, at paragraph 63). I also note that this agency, along with other State and local government agencies, is required to publish an Information Statement describing, *inter alia*, its record-keeping system and to publish its internal manuals including its policy documents. In time, these publication requirements will inform the public about the functions of agencies and the types of records that are kept and the types of documents available for access.
44. The applicants have not provided me with any material that would enable me to conclude that the requested documents exist. The agency submitted that if any documents of the type requested existed they would be on the file. I am not satisfied that the requested documents exist, and I am satisfied that the attempts by the agency to locate any documents fitting the description of "diary notes/file notes" have been reasonable in all the circumstances.

Are there reasonable grounds for believing that documents consisting of minutes of a technical working party established under the Beenup Working Party exist in the agency?

45. The agency claimed that all documents referring to the minutes of the technical working party have been provided to the applicants. The applicants claimed that minutes of the larger Beenup Working Party had been provided but that there were no minutes relating to the work of the smaller group. I was informed by the agency that the smaller group was chaired by an officer of the Mines Department and that the agency's representative on this group was Mr Chandler of the Bunbury office of the agency. On 13 February 1994, Mr Chandler provided the Perth office of the agency with four volumes of papers that he considered may be relevant to the applicants and their Scott River property. It is my understanding that copies of those papers had previously been sent to the agency in Perth and from those documents material within the scope of the access application was made available to the applicants during their discussions and meetings with the agency. Subsequently, those documents were inspected by one of my officers.
46. Based on my officer's inspection of those papers and her advice to me, I am satisfied that the agency does not hold any further documents of the type requested by the applicants. I am not satisfied that the requested documents exist, and I am satisfied that the searches conducted by the agency to locate documents meeting that description have been reasonable in all the circumstances.

Are there reasonable grounds for believing that notes of meetings in April 1991 between the agency, BHP and Bunnings relating to the Scott River property, exist in the agency?

47. The agency undertook searches within its own filing system in the Perth office, and made contact with the officers in the satellite offices of the agency, which may have held records relating to meetings between BHP and Bunnings. Those officers made searches of the manual and computerised records filing systems maintained in the offices of the agency. The agency claimed that the applicants have been provided with access to all documents relating to this part of their request. I have also inspected a copy of the file, and I note that there are documents on that file which relate to decisions taken by Bunnings and BHP in relation to the Scott River property. It is also my understanding that those documents have all been made available to the applicants. However, there are no documents on the file that may be described as notes of any meeting in April 1991. Officers of the agency do not recall such documents, although there is material that suggests to me that discussions took place between the various parties mentioned. However, there is no material before me to suggest that records of those discussions were made, nor have the applicants provided any material to the contrary.
48. Therefore, there is no material before me from which I can conclude that such documents exist or even existed. Access has been refused on the basis that no such documents can be found. I am satisfied that the searches by the agency were, in all the circumstances, reasonable.

Are there reasonable grounds for believing that the agency holds documents at the Busselton, Manjimup and Margaret River offices of the agency relating to the Scott River property ?

49. I was informed by the agency that, from the outset, all relevant documentation relating to this access application was retrieved from the Busselton, Manjimup and Margaret River offices of the agency. I was further informed that those documents have all been made available to the applicants and that no other documents exist at those centres. In addition, the agency has contacted a number of its employees who may have had any contact over the years with the applicants, or an involvement with their property, to inquire about the existence of relevant records. These additional inquiries have proved fruitless.
50. There is no material before me, from either the applicants or the agency, from which I can conclude that additional file notes exist or, if they do, where those documents may be found. On that basis, I am not satisfied that there are reasonable grounds for believing that the requested documents exist and I am satisfied that the search efforts of the agency have been reasonable in all the circumstances.

CONCLUSION

51. It is apparent that the applicants have received copies of a number of documents from the agency since first submitting their access application under the FOI Act. It is also apparent that the receipt of those documents has only raised more questions in the minds of the applicants. The agency has attempted to answer many of those questions. However, the applicants are also seeking answers from my office.
52. The purpose of the FOI Act is to provide a legally enforceable right of access to documents held by State and local government agencies. That right is a right of access to documents rather than information. The FOI Act does not require an agency to explain the contents of its documents, nor is it the function of the Information Commissioner to provide such an explanation. My role is to decide the issues that arise when dealing with a complaint made to my office under the FOI Act. Those issues are usually identified early on and agreed to between the parties through a process of conciliation and negotiation undertaken by my officers when dealing with a complaint, subject to the statutory framework which defines my jurisdiction.
53. In this instance, the two issues with which I am empowered to deal concern a decision to refuse access to 14 documents on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. The second matter was the sufficiency of the searches conducted by the agency to locate documents that the applicants claimed were missing from the file.

54. During several discussions with my office, the applicants made it clear that they did not believe the claims of the agency that certain documents did not exist or could not be found. It was the view of at least one of the applicants that it was unacceptable for the agency to simply claim that documents were missing or that there were no records on file relating to certain matters.

55. As I have stated in paragraphs 27-31 above, it is not the function of the Information Commissioner to physically search for documents on behalf of an applicant. I have taken the time in this decision, as in others, to describe the processes and policies that exist in agencies, and to identify deficiencies, if any, in order to assist agencies to improve aspects of their operations. In this instance, the record keeping practices of the agency are complicated by the diversity of its operations and the separate records that exist at its various locations. In my view, the agency does not appear to have a policy relating to record keeping that would provide parameters for the guidance of staff in these matters, nor is there a means of readily identifying and retrieving relevant information. However, as a result of dealing with this access application, the agency has recognised a need for improvement in these areas.

56. The applicants' request to my office for external review of the decisions of the agency contained a suggestion that records had been destroyed and they were seeking an explanation of this. There is simply no evidence before me of any destruction of records and, in the absence of such evidence, I reject that suggestion. The explanation which the applicants seek in relation to the records missing from the attachments to folios 41 and 43 is contained in paragraphs 32-39 above.
