

OFFICE OF THE INFORMATION COMMISSIONER (WA)

Decision summary issued pursuant to s.76(8) of the *Freedom of Information Act 1992*

COMPLAINT No: F0071998

DECISION No: D0141998

PARTIES: Zoran Alexander KILPA

Complainant

WESTERN AUSTRALIAN MUSEUM

Respondent

Issue: Sufficiency of search

Relevant Section: s.26

Mr Kilpa ('the complainant') is an employee of the Western Australian Museum ('the agency'). In the course of the complainant's employment in the agency, certain management issues arose and documents were created as a result of the agency dealing with those management issues.

By letters dated 29 October 1997, the complainant lodged a series of access applications with the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to various documents. In respect of this matter, the complainant sought access to a report dealing with certain disciplinary matters concerning him prepared by the Manager, Human Resources, in the agency.

The agency refused access to the requested document on the ground that it is exempt under clause 8(2) of Schedule 1 to the FOI Act. The agency's initial decision was subsequently confirmed following internal review. Thereafter, on 22 January 1998, I accepted an application from the complainant seeking external review of the agency's decision.

Review by the Information Commissioner

After this complaint was received, a preliminary conference was held with the agency to determine whether this matter could be resolved by conciliation between the parties. Following those discussions, the agency agreed to give the complainant access to an edited copy of the requested document with certain matter deleted. The agency maintained its exemption claim under clause 8(2) in respect of the deleted matter.

The complainant accepted access in that form. That is, the complainant did not wish to pursue access to the matter deleted from the document. However, the complainant questioned whether he had in fact received a copy of the actual document requested because he had been given an edited copy of an unsigned letter rather than a report as requested. Inquiries were made with the agency concerning the sufficiency of the searches it had conducted to locate the documents within the ambit of the complainant's access application.

On 31 March 1998, after considering the material before me, I informed the parties in writing of my preliminary view of the outstanding issue in respect of this complaint, including my reasons. The only outstanding issue was the question of whether the document given to the complaint was the document requested by him in his access application. The answer to that question concerned the sufficiency of the searches conducted by the agency.

It was my preliminary view that the unsigned letter was in fact the "report" identified by the complainant, and that the searches conducted by the agency in the first instance were, in all the circumstances, reasonable.

The complainant did not respond to my preliminary view, and he did not withdraw his complaint. As there is no new material before me, I am not dissuaded from my preliminary view. A summary of my reasons follows.

Documents that do not exist or cannot be found

The complainant is of the view that the document in his possession is not the kind of document that would normally be created in the agency to deal with disciplinary matters. Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate the documents sought by an access applicant. That section 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.”*

In this instance, the agency located a document that it considered to be the document requested by the complainant. Accordingly, in the view of the agency’s decision-makers, there was no requirement that it send the complainant a notice in the form required under s.26, and it did not do so. Nonetheless, there is an issue before me concerning an alleged document that has not been found by the agency.

Taking into account the terms of s.26 of the FOI Act, in my view, the first question is whether there are reasonable grounds to believe that the requested document exists, or should exist and is, or should be, held by the agency. The second question is whether the agency has taken all reasonable steps to find that document and is satisfied either that it is in the agency’s possession and cannot be found or that it does not exist.

If I am satisfied that an additional document exists, or should exist in an agency, I consider that it is my responsibility to inquire into the adequacy of the searches conducted by the agency and to require further searches, if necessary, in order that I am satisfied that the agency has acted in accordance with its obligations under the FOI Act.

Existence of the document

In this instance, I am informed by the agency that the Chief Executive Officer instructed the Manager of Human Resources to inquire into certain matters raised in a letter sent to the agency by the complainant’s solicitor. It appears that the Manager, Human Resources, was also instructed to prepare his report in the form of a draft letter to be sent from the Chief Executive Officer to the complainant’s solicitor. I am also informed that the unsigned draft letter is the “report” referred to by the complainant in his access application. The complainant does not accept the advice given to me by the agency, but there is nothing before me to cause me to question the accuracy of that advice.

I am informed by the agency that when the complainant lodged his series of access applications, routine searches of the agency’s record keeping systems were conducted to find the various documents requested. The only document found in respect of this complaint is the unsigned draft letter. That draft letter was accompanied by a transmission memorandum from the Manager, Human Resources, to the Chief Executive Officer, conveying the results of his investigation in the form of a letter as instructed.

From my examination of the document and other material on the agency’s file, I am satisfied that the draft letter is the document identified by the complainant in his access application. The complainant has been given access to an edited copy of each of the draft letter and the transmission memorandum. Therefore, I consider that the agency has satisfied the complainant’s request for access to the document requested. I find that the agency has taken all reasonable steps to locate the requested document, and has located the requested document, and that the additional document that the complainant claims must exist, does not exist. I confirm the decision of the agency to refuse access on that basis.

