

OSET AND MPC

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

**File Ref: 94070
Decision Ref: D01494**

Participants:

Batoul Oset
Applicant

- and -

Ministry of the Premier and Cabinet
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access where documents cannot be found - notice issued under s.26 - sufficiency of search - whether agency has taken reasonable steps to find documents - extent of search by agency - whether further inquiries with former employees warranted.

Freedom of Information Act 1992 (WA) ss.26; 65(1).

Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health (1985) 8 ALD 163.

Wilson v Australian Federal Police (1983) 5 ALD 343.

DECISION

The decision of the agency to refuse access, on the grounds that the requested documents cannot be located, is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

2nd September 1994.

REASONS FOR DECISION

BACKGROUND

1. This complaint to the Information Commissioner concerns the adequacy of searches made by the Ministry of the Premier and Cabinet ('the agency') when dealing with an access application made under the *Freedom of Information Act 1992* ('the FOI Act') by Ms Batoul Oset ('the applicant').
2. On 24 February 1994 the applicant wrote to the Premier of Western Australia, the Hon Richard Court MLA, seeking access under the FOI Act to her personal file held by the agency. She required access in the form of supervised inspection and copies of relevant documents identified during access. Access in full was subsequently provided on 29 March 1994. This was confirmed in a letter from the agency on 8 April 1994 when additional copies of certain documents were made available to the applicant.
3. On 10 March 1994 the applicant requested copies of a further three documents from her file. She also sought access to two additional documents described as:
 - (i) A copy of her letter of 2/10/89 to the Director General of the agency relating to the termination of her employment; and
 - (ii) A copy of a complaint made against her by an unknown complainant in 1991 ('the requested documents').
4. The applicant was provided with copies of the three documents but the agency advised her that her application for access to the requested documents was not part of her original FOI access application and it would therefore be treated as a new FOI application. On 10 June 1994 the agency further advised the applicant that that part of her application relating to the 1991 complaint had been partially transferred to another agency, the Office of Womens Interests (OWI).
5. On 14 June 1994 the agency provided the applicant with a notice pursuant to s.26 informing her that access was refused because the agency was unable to locate the requested documents. This decision was made by Mr Greg Moore, Manager, Human Resource Services on 10 June 1994.
6. On 17 June 1994 the applicant applied to the Information Commissioner for external review of this decision. However, internal review had not been sought and the applicant was referred back to the agency for this to occur. The applicant applied for internal review of the decision. On 8 July 1994 the applicant received a notice of decision from the agency in which the internal reviewer Mr Brian Boylen, Executive Officer, confirmed the original decision to deny access on the grounds that the requested documents could not be found. Mr Boylen described the actions taken by the agency to locate the requested documents, which included seeking advice from former officers of the agency who may have been able to provide assistance. He also advised the applicant that it was his decision

that the partial transfer of her request to OWI was appropriate in the circumstances as records indicated that the 1991 document originated from that agency.

7. On 27 July 1994 the applicant subsequently sought external review by the Information Commissioner of this decision of Mr Boylen. In her application to my office the applicant complained that the efforts of the agency had not been sufficient to locate the requested documents. She referred to a number of present and past officers employed in the public sector and indicated that it was her belief that these officers could assist in this regard.

ACTION BY THE INFORMATION COMMISSIONER

8. I accepted this complaint pursuant to s.65(1)(d) of the FOI Act and the agency and the applicant were advised of this on 29 July 1994. In her letters of complaint to the agency, and to my office, the applicant included references to extraneous matters. The applicant had not received a decision from OWI on the matter that had been partially transferred and the extraneous matters related to requests for additional documents which were not within the scope of her access application. The applicant was advised that the only matter for my determination concerned the decision to refuse access because the two requested documents could not be found by the agency.

Documents that cannot be found or do not exist.

9. 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. This section 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."*

10. For the purpose of my dealing with this complaint there are two questions that must be answered. Firstly, are there reasonable grounds to believe that the requested documents exist? Secondly, in circumstances in which the first question is answered in the affirmative, were the searches conducted by the agency to locate the documents reasonable in all the circumstances?
11. In my view, it is not my function to physically search for the requested documents on behalf of an applicant, nor is it my function to examine in detail the agency's record-keeping system. However, it is my responsibility to inquire into the adequacy of the searches conducted by an agency, to request further searches if necessary and to satisfy myself that the agency has acted reasonably, pursuant to its obligations under the FOI Act.
12. Consequently, a member of my staff visited the agency on 3 August 1994 and met with relevant staff. That meeting was conducted in three phases. Firstly, the agency's search procedures were outlined to my staff member in general terms. Secondly, the member of my staff met and spoke with the officer responsible for conducting the searches in the Records Office for the requested documents. Thirdly, the applicant's personal file was produced and inspected.
13. The following explanation of the procedures applied within the agency with respect to the handling of external correspondence was provided to me:
 - Loose documents are recorded on a data base as being received by the agency and referred to a particular section or officer for action.
 - Following appropriate action the reply is recorded in a letter book.
 - A copy of the response and the original letter are referred back to the record area for filing.
14. The agency confirmed that the requested documents had been received and sent to relevant areas for attention. However, the records showed the documents had not been actioned and returned for filing in accordance with the procedures outlined above. The 1989 letter regarding termination of the applicant's employment had been sent to the then Chief Executive Officer of the department entitled Ministry of Cabinet and Public Sector Management. The 1991 letter of complaint about the applicant had been sent to the then Chief Executive of the Department of Cabinet.
15. The Ministry of Cabinet and Public Sector Management and the Department of Cabinet are defunct agencies whose functions are now performed by the agency known as the Ministry of the Premier and Cabinet. This agency said, in explanation, that it was not uncommon, when there was a change in personnel in either of those two former organisations, for information to be discarded or

retained by the persons concerned. The agency further informed me that it was also a possibility that the documents had been discarded when changes were made to the organisation. That may have occurred if the papers were not considered essential for the maintenance of the public record. Therefore, although there appear to be reasonable grounds to conclude that the documents once existed, on the evidence it cannot be determined whether they still exist or whether they are still in the possession of the agency.

16. The extent of the searches conducted by the agency consisted of:
- a full data search and interrogation of the record system under possible names associated with the documents including, but not limited to, the applicant's surname and her initials;
 - a search of a number of specific files and general files dealing with subject matter involving women's interests, harassment and the like;
 - the specific file dealing with termination of employment was checked;
 - personal contact was made with public sector employees whose initials appeared on related documents to see whether they could recall seeing the documents; and
 - a second page by page inspection of the applicant's personal file was made, to no avail.

Were the searches by the agency reasonable?

17. The adequacy of efforts made by an agency to locate documents the subject of an FOI access application are to be judged by having regard to what was reasonable in the circumstances: *Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* (1985) 8 ALD 163. The agency has made what I consider to be a more than reasonable attempt to locate the requested documents. Mr Boylen went further than was necessary by contacting individuals whose only connection with the documents might have been due to the fact that their initials appeared on related documents and there was a chance that they had seen or could remember those documents.
18. The mere fact that the record shows the document had been sent to certain individuals does not mean that the particular individuals would have dealt with the correspondence personally. It is more likely to have been actioned by other staff on behalf of them. However, there is no record of this having occurred, if in fact it did. Given the positions and functions of the individuals concerned and the length of time that has passed since those documents were in circulation, in my view it is not reasonable to expect the agency to seek comment from the two former Chief Executives.
19. In my view, the search by the agency has been adequate and well directed. All related files have been checked and computer searches using a variety of combinations of data have been made. In my opinion, there is nothing further that could be done that is likely to locate the requested documents. Although the

applicant referred to a number of senior public sector employees, whom she nominated as being associated in some way with her previous employment, I consider it unlikely that they could assist. The individuals nominated include Crown Counsel, members of the Public Service Appeal Board and the Director General of the agency. Those people were nominated by the applicant on the basis that they had some involvement in her appeal against the termination of her employment. Their connection these individuals might have had with the requested documents is a remote one only and I am not persuaded that their interrogation by the agency would be reasonable or fruitful in all the circumstances.

20. The fact that a document cannot be found in an agency's filing system does not necessarily mean that it does not exist or is not in the possession of the agency. Where there is evidence that it was received, and no evidence to suggest that it has passed out of its possession, there is a strong possibility that it is still in the possession of the agency but that it is misplaced: *Wilson v Australian Federal Police* (1983) 5 ALD 343. Until such time as the requested documents may be located within the agency, I consider the searches conducted thus far to be reasonable and that nothing further remains to be done.
