

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

**File Ref: F2004173
Decision Ref: D0192004**

Participants:

Désiré Edgar Michel Mallet
Complainant

- and -

Edith Cowan University
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - section 26 - whether reasonable grounds to believe that a document exists or should exist - sufficiency of searches.

Freedom of Information Act 1992: ss. 26(1), 43(2).

DECISION

The decision of the agency to refuse access under section 26 is confirmed. The agency has taken all reasonable steps to find the requested document but it cannot be found.

D A WOOKEY
A/INFORMATION COMMISSIONER

10 December 2004

REASONS FOR DECISION

1. This complaint arises from a decision made by Edith Cowan University ('the agency') to refuse Mr Mallet ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. I understand that the complainant is enrolled as a graduate student at the agency. On 12 July 2004, the complainant applied to the agency under the FOI Act for:

- “1. A copy of the **signed letter** that I wrote to the Equity and Diversity Unit on 22 March 2000
2. A copy of the **signed letter** that I addressed to the Manager, Equity and Diversity Unit on 21 August 2000. It was a two-page letter that was sent through *Australia Post*.”

3. On 15 July 2004, Mr David Lloyd, Manager-Governance at the agency, wrote to the complainant and advised that he was dealing with that access application outside the FOI Act.

4. On 5 August the complainant wrote to Mr Lloyd and asked that his application be considered under the FOI Act so that he would be able to exercise the rights of review contained in that legislation. In response, on 12 August 2004, Mr Lloyd wrote to the complainant and said:

“The documents you requested would be available outside the Freedom of Information process as they concern a meeting to which you were a party.

I am currently holding the three personal files that relate to your enrolment at ECU as a student.

A search of the files did not reveal copies of the letters dated 22 March 2000 or 21 August 2000 sent by you to the Manager of the Equity and Diversity Unit.

...

Regrettably we are unable to provide the documentation you have requested.”

It is not clear from that letter whether the agency was then dealing with the complainant's access application in accordance with the FOI Act or not. Clearly that letter is gravely deficient if it purports to be a notice of decision in the format required by section 30 of the FOI Act.

5. On 30 August 2004, the complainant wrote to the agency requesting an internal review of Mr Lloyd's "decision" which he understood to be a decision to refuse access to documents under section 26 of the FOI Act, although no mention of that provision was made in the agency's letter of 12 August 2004. On 20 September 2004, Mr Lloyd wrote in response that an internal review was being conducted and would be completed by 30 September 2004, notwithstanding the

fact that, under section 43(2) of the FOI Act, the agency had only 15 days after the application for review was lodged in which to conduct that review and was by then out of time.

6. In the meantime, on the same day - 20 September 2004 - having received no notice of decision on internal review, the complainant applied to me seeking external review on the basis that the agency was deemed to have confirmed its original decision and I accepted his complaint, pursuant to section 43(2).

REVIEW BY A/INFORMATION COMMISSIONER

7. In my view, the manner in which the agency dealt with the complainant's access application was seriously deficient and not in keeping with its obligations under the FOI Act.
8. On receipt of this complaint I obtained the agency's FOI file relevant to the complainant's access application and I required the agency to make further searches and conduct further inquiries in relation to the requested documents. In the course of those searches, the agency located unsigned copies of the two letters and gave the complainant access to them. Following further searches, the agency also located a signed copy of the letter dated 22 March 2000 and gave the complainant access to that document. Accordingly, the complaint in relation to that particular document is now satisfied.
9. In addition, the complainant provided me with information and material in support of his claims that, in the past, the agency had mislaid letters sent to it by registered post and that his correspondence to the agency has met with delays or no response. He also noted the agency's non-compliance with the provisions of the FOI Act in relation to his access application. In view of what appear to be well-founded concerns by the complainant, my office asked the agency to make further inquiries about the requested document, in particular, with the former Manager of the Equity and Diversity Unit ('the Unit') to whom the relevant letter was directed.
10. On 11 November 2004, I informed the parties, in writing, of my preliminary view of this complaint. My preliminary view was that, following the further searches and inquiries requested by my office, the agency had taken all reasonable steps to find the letter dated 21 August 2000 but that it cannot be found. I did not require the agency, at that stage, to make further searches for it.
11. In response to my preliminary view, the complainant referred to an apparent contradiction between statements made by the agency and by the former Manager of the Unit and declined to withdraw his complaint.

THE REQUESTED DOCUMENT

12. The requested document is a two-page letter dated 21 August 2000 signed by the complainant and addressed to the Manager of the Unit, at the agency.

DOCUMENTS THAT DO NOT EXIST OR CANNOT BE FOUND

13. Section 26(1) of the FOI Act deals with the obligations of the agency in circumstances where it is unable to locate documents sought by an access applicant or where those documents do not exist.

Section 26 provides:

- “(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.”*

14. I consider that, when dealing with such an issue, 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 next question, in my view, is whether the agency has taken all reasonable steps to find those documents.
15. I do not consider that it is my function to physically search for the requested documents on behalf of a complainant. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary.

The complainant’s submission

16. I understand the complainant to submit that, since he posted the requested document to the agency, it is reasonable to expect that that document will be in the agency’s possession.

The agency’s submission

17. I understand that the agency accepts that it received the requested document by post from the complainant but submits that, having now conducted reasonable searches, that document cannot be found.

The searches and inquiries made by the agency

18. The agency advises that it has now instigated searches in every location that might be relevant.
19. In addition, the agency says that it has made inquiries with the following persons in relation to all files that have relevance to the complainant which are held by the agency:
 - the Executive Dean, Community Services, Education and Social Sciences ('CSESS');
 - the Head of School, CSESS and the School Administrator, CSESS;
 - the Senior Lecturer, CSESS;
 - the Associate Dean, CSESS;
 - the Director, Student Services Centre and the Executive Support Officer, Student Services Centre;
 - the Manager, Student Operations - Student Services Centre;
 - the Director, Graduate School;
 - the Executive Officer to the Vice-Chancellor;
 - the Executive Officer, Higher Degrees Office;
 - the Equity and Diversity Officer-Students, of the Unit;
 - a Professor of the School of Education;
 - the Associate Dean, Business and Public Management;
 - the former Manager of the Unit;
 - the Manager of the Unit; and
 - the Policy and Project Officer, Governance Services.
20. In particular, the agency advises that searches were made of the agency's Record Management System - TRIM ('the database'), the Unit, Governance Services and the Student Services Office. The agency says that a search of the database using key words, including the complainant's name, disclosed no relevant information and disclosed no files for student correspondence to the Unit. However, I also understand that there are no Unit files for correspondence from students at the relevant dates (March - August 2000).
21. I understand that the normal procedure on receipt by the Unit of a letter through the mail is that it is delivered directly to the Unit, rather than to some central location; is entered onto the database by the officer in charge of mail; and is then passed on to the addressee. However, I am advised by the agency that the letter of 22 March 2000 which was ultimately located was not date-stamped or otherwise marked as having been received by the agency.
22. With regard to the Unit's files, searches were made of the filing cabinets in the Unit but the requested document was not located. The agency advises that the only relevant file at the Unit is now held in Governance Services. Searches were also made of the FOI files in Governance Services generated by the complainant's access applications and it was on those files that the letter dated 22 March 2000 was located, but not the requested document. In addition, the

Complaints files held in Governance Services were searched and yielded - from File no. 04/266 - the two unsigned copies of the relevant letters.

23. The agency advises that it also searched the complainant's Student - or Personal - File held in the Student Services Office, of which I understand there are currently 5 volumes. Following those searches, all five files were passed to Governance Services which had the documents placed in chronological order and rebound. Neither the requested document nor copies of it were located on those files.
24. The agency advises that inquiries were made of the current Manager of the Unit, who in turn made inquiries with the Graduate School. I understand from those inquiries that the Unit does not have a policy or procedures for dealing with correspondence although each unit in the agency's hierarchy has its own recordkeeping system which, I understand, operates in accordance with the advice of the Records Management Unit. The agency provided me with a copy of its Records Management Policy.
25. In addition, the agency contacted Ms Lord, the former Manager of the Unit, and asked her whether she could assist in locating the requested document. Ms Lord advises me that she personally received all correspondence addressed to the Manager. She notes that the normal procedure for written correspondence was that it was read, action was decided and the letter and any written responses, including any file notes, were filed in the Manager's office. A separate file was made for each person. Letters relating to complaints or concerns from staff and students were kept in a dedicated filing cabinet that was separate from the general filing system that related to the operation of the Unit or other university business.
26. Ms Lord recalls meeting with the complainant but has no recollection of the specific details of his complaint. Ms Lord was given a copy of the unsigned version of the requested document and has a vague recollection of having received it but after this period of time cannot remember if she responded to that letter. Ms Lord advises that the usual practice would have been to file the requested document and any response to it on the complainant's file.
27. The complainant notes from the advice given to me by the former Manager of the Unit that any correspondence between him and the Unit should be on the separate file relating to him held by the Unit. However, he also provided me with an email, dated 15 October 2004, from Governance Services which states:

“Equity and Diversity...do not have a file for Désire. All correspondence they have received they have passed on to various people and places - but alas, there is no paper trail to follow.”

I do not understand from this, as the complainant suggests, that there is necessarily any contradiction between the advice given by Governance Services and that given by the former Manager of the Unit, since it is clear that any file or documents relating to the complainant once held by the Unit are no longer held there. However, I am concerned that the agency's record-keeping systems

are of no assistance in tracking or locating the requested document in this case and the agency may wish to review the operation of those systems in light of the problems encountered here.

CONCLUSION

28. Having reviewed the searches undertaken by the agency, I am satisfied that all reasonable steps to find the requested document have now been taken and that proper searches have been conducted but that the requested document cannot be found. The fact that a document cannot be found in an agency's filing system does not necessarily mean that it does not exist or that it has been deliberately lost or misplaced. Where there is evidence that it was received, and no evidence to suggest that it has passed out of the agency's possession, there is a strong possibility that it is still in the possession of the agency but that it is misplaced or misfiled. Accordingly, I confirm the agency's decision to refuse access under section 26(1) of the FOI Act on the ground that the requested document cannot be found.
