

UREN AND PLANNING

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

**File Ref: 94139
Decision Ref: D02195**

Participants:

Allan Cole Uren
Complainant

- and -

**Ministry for Planning (formerly
Department of Planning and Urban
Development)**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - section 26 - documents either in the possession of the agency but cannot be found or do not exist - notice issued under s.26(1) - sufficiency of search - whether agency has taken reasonable steps to find documents - allegation of breach of duty - role of the Information Commissioner.

Freedom of Information Act 1992 (WA) ss. 26; 63(3).

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

Re Oset and Ministry of the Premier and Cabinet (Information Commissioner, WA, 2 September 1994, unreported).

Re Lithgo and City of Perth (Information Commissioner, WA, 3 January 1995, unreported).

Re Tickner and Police Force of Western Australia (Information Commissioner, WA, 7 March 1995, unreported).

Re Nazaroff, Nazaroff and Nazaroff and Department of Conservation and Land Management (Information Commissioner, WA, 24 March 1995, unreported).

Re Goodger and Armadale Kelmscott Memorial Hospital (Information Commissioner, WA, 9 May 1995, unreported).

Re Oset and Health Department of Western Australia (Information Commissioner, WA, 1 June 1995, unreported).

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

DECISION

The decision of the Department of Planning and Urban Development (now the Ministry for Planning) of 30 January 1995 to refuse access to the requested documents on the ground that those documents either do not exist or cannot be found, is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12th July 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 Planning and Urban Development ('DPUD'), now the Ministry for Planning ('the agency') to refuse Mr Uren ('the complainant') access to documents requested under the *Freedom of Information Act 1992* ('the FOI Act'). Access was refused on the basis that the documents either do not exist or cannot be found. The complaint, therefore, concerns the adequacy of searches conducted by the agency to locate the requested documents
2. On 26 August 1994, the complainant lodged an access application with the agency under the FOI Act seeking access to documents relating to a decision of the now defunct Metropolitan Region Planning Authority ('the MRPA') to insert an "overlay" to cover the 1974 Amendment Map 13/4, and the incorporation of the clause 15 Plan C333A into that Map 13/4.
3. I am informed by the agency that the MRPA was replaced by the State Planning Commission in 1985. DPUD was established in 1989 as its support agency. On 1 March 1995, the State Planning Commission was replaced by the Western Australian Planning Commission ('the WAPC') and DPUD by the agency. The agency provides the professional and administrative expertise to assist the WAPC to discharge its decision-making functions under various statutes relating to town planning and maintains the records of the WAPC. The agency is also in possession of the records of the predecessors of the WAPC.
4. Attached to the complainant's access application was a letter to the agency containing further details relevant to the request. Following that application, by a series of further letters to the agency dated 13 September 1994, 12 October 1994 and 18 October 1994, the complainant sought access to a number of additional documents associated with his first request.
5. It appears that the agency treated all of those letters as part of the one access application under the FOI Act. On 13 December 1994, the FOI Co-ordinator in the agency conveyed to the complainant the agency's decision on access. That decision, which was made by Mr Peter Melbin, Acting Director of Corporate Management of the agency, on 9 December 1994, effectively denied the complainant access to certain documents on the ground that those documents did not exist. However, all other documents which had been located and identified as being within the scope of the access application were released to the complainant.
6. On 23 January 1995, the complainant sought internal review of the agency's decision to deny access on the ground that some of the requested documents do not exist or cannot be found. By letter dated 30 January 1995, the complainant was informed that the decision of the agency was confirmed on internal review. On 8 February 1995, the complainant applied to the Information Commissioner

for external review of the agency's decision because he remained dissatisfied with the agency's claims that documents related to his request either cannot be found, or do not exist.

ACTION BY THE INFORMATION COMMISSIONER

7. 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 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."

8. In my view, the letter from the agency to the complainant dated 30 January 1995, being the decision after internal review, is to be regarded, in part, as a notice pursuant to s.26(1) of the FOI Act. On that basis, I accepted the complaint as a complaint against a decision of the agency to refuse access to the requested documents. However, the question for my determination is whether the decision of the agency to refuse access, on the basis that the documents either do not exist or that they exist but cannot be found, was justified. The answer involves a consideration of whether the agency's efforts to locate the documents were reasonable in all the circumstances.

Documents that cannot be found or do not exist

9. On a number of occasions when dealing with complaints about access to documents under the FOI Act, I have considered allegations about missing documents: see *Re Doohan and Western Australia Police Force* (5 August 1994,

unreported); *Re Oset and Ministry of the Premier and Cabinet* (2 September 1994, unreported); *Re Lithgo and City of Perth* (3 January 1995, unreported); *Re Tickner and Police Force of Western Australia* (7 March 1995, unreported); *Re Nazaroff, Nazaroff and Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported); *Re Goodger and Armadale Kelmscott Memorial Hospital* (9 May 1995, unreported); *Re Oset and Health Department of Western Australia* (1 June 1995, unreported).

10. In those decisions I have discussed the function of the Information Commissioner when dealing with complaints that concern documents allegedly missing from an agency's record-keeping system. However, I will repeat my view of that function since, in my opinion, it is, of necessity, limited. The function of the Information Commissioner, when reviewing a complaint involving a denial of access on the ground that requested documents either do not exist or cannot be located, is limited, in my view, to inquiring into the adequacy of the searches conducted by the agency. I do not consider it is my function to physically search for the documents on behalf of a complainant, nor to examine in detail an agency's record-keeping system. However, if I am not satisfied that those searches have been adequate, I will exercise my power, under s.26(2) of the FOI Act, to require an agency to conduct further searches in an effort to locate documents.
11. In this instance, I required the agency to provide details of the searches conducted in dealing with the complainant's access application. The agency also conducted further searches following a preliminary conference with one of my officers attended by both the agency and the complainant on 3 March 1995, and in response to letters to me from the complainant dated 20 and 22 March 1995, copies of which I provided to the agency. In summary, the searches conducted by the agency consisted of:
 - (i) A search of the agency's index for amendments to the Metropolitan Region Scheme ('the MRS') following receipt of the access application, particularly amendments associated with the 1974 Omnibus amendment to the MRS and its supporting plans. A cross reference check of land associated with the complainant was also conducted. Working copies of the minutes of the meeting of the MRPA held on 10 July 1974 were also searched.
 - (ii) Further searches were undertaken on or after 4 November 1994 which included a search of the minutes of the meetings of the MRPA for the calendar year 1974. The official minutes stored in the State Archives were searched, including the minute books and the report books for 1974.
 - (iii) The microfiche record of file number 809-2-8 (District Planning Committee file for the Eastern area of the Perth Metropolitan Region) was searched following the preliminary conference between the parties. It is my understanding that relevant documents located during that search were provided to the complainant, as well as minutes of a meeting of the MRPA dated 27 June 1973.

- (iv) In response to a letter from my office dated 2 May 1995, the agency made a further search of file 809-2-8.
12. The complainant was informed of the details and results of those searches. It is my understanding that the agency offered to make available to the complainant, at cost, certain documents from file 809-2-8. On 20 June 1995, the complainant visited the agency and, by arrangement, inspected several maps relating to the 1974 Omnibus amendment to the MRS, which is his particular area of concern. Following that meeting, the agency offered, and the complainant accepted, a reproduction of the MRPA 1974 Amendment Map 13/4 and a reproduction of the MRPA 1974 Overlay Map 13/ at the appropriate cost.
13. However, following that inspection, the complainant remained dissatisfied because the Amendment Map 13/4 that he had inspected contained obscure endorsements on the lower margin which he was unable to read and he doubted that the map he had inspected was the original map deposited for public inspection. Further, it was the view of the complainant that, as the overlay map did not contain any evidence that it was the actual map approved for public display in the Government Gazette dated 2 August 1974, that additional documents relating to that authorisation should also exist in the agency.
14. On 26 June 1995, I advised both parties of my preliminary view that the searches conducted by the agency had been, in all the circumstances, reasonable. In a letter to my office dated 29 June 1995 responding to my preliminary advice, the complainant indicated that he wished, nonetheless, to pursue his complaint to a formal decision. In relation to the documents that he had inspected he said:
- "It is my belief that your [sic] are entitled to and ought to instruct the agency to provide me a copy of the original official MRPA 1974 Amendment Map 13/4 in lieu of the mutilated copy currently on offer to me under the guise of the "official record"...The agency has got to have the original official MRPA 1974 Omnibus Amendment Map 13/4 because it has allowed me to view the notorious overlay to it."*
15. In his original access application, the complainant sought access to copies of the requested documents and the agency provided him with copies of those documents relevant to his request that could be found. It appears to me that the complainant's desire to access the original maps arose from the fact that other documents relating to his request, which he believes should exist, do not in fact exist. In explanation the agency said that the lapse of over 20 years had made it difficult to explain the absence of relevant records.
16. In my view, given the lapse of time of over 20 years since some of the documents came into existence, it is not surprising that the agency's records may appear incomplete. Although the complainant believes that sensitive documents relating to his request may exist, there is no material before me which suggests that the agency has withheld information from my office or from the complainant that is within the ambit of his access application.

17. Further, it is not my function to instruct this agency or any other agency to provide a copy of documents that cannot be found or do not exist. Although the complainant urged me to take action under s.63(3) of the FOI Act dealing with breaches of duty, I am not satisfied that any breaches have occurred in this instance. However, I am satisfied that the agency has taken all reasonable steps to comply with the complainant's access application.
18. As I have said before, in my decision in *Re Oset and Health Department of Western Australia*, at paragraph 17 of that decision, 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, at 170. In this instance, I am satisfied that the agency has taken all reasonable steps to locate the requested documents. Further, I am satisfied that nothing more could be done in order to satisfy the complainant.
19. In my view, the agency has adequately informed the complainant of its search efforts so that he should be well aware of the nature and extent of the searches it has undertaken. I am also satisfied that the requested documents either do not exist or cannot be found.
