

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

**File Ref: F2003214
Decision Ref: D0222004**

Participants:

Robert Desmond Anderson
Complainant

- and -

Water Corporation
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents regarding decision by the Board of the agency to abolish complainant’s position – documents relating to Board decision to review Branch – access refused because documents do not exist – section 26 – whether reasonable grounds to believe that documents exist or should exist – sufficiency of searches.

Freedom of Information Act 1992 (WA) s. 26; Schedule 1 clauses 3(1), 11(1)(d).

Re Doohan and Police Force of Western Australia [1994] WAICmr 13;

Re Oset and Ministry of the Premier and Cabinet [1994] WAICmr 14.

Re Barrett and Police Force of Western Australia [1995] WAICmr 32.

Re Anti-Fluoridatoin Association of Victoria and Secretary to Department of Health (1985) ALD 163, at 170.

DECISION

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

D A WOOKEY
A/INFORMATION COMMISSIONER

22 December 2004

REASONS FOR DECISION

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

BACKGROUND

2. I understand that a review of the Technology and Research Management Branch ('the Branch') of the agency was conducted in May 2003. As a result of that review, a draft report ('the Report') was prepared by consultants and, although only a draft, I understand that the agency accepted the Report as the final report of the review. I also understand that the review was completed in June or July 2003.
3. At the time of the review, the complainant was the Manager, Intellectual Property Unit of the Branch. As a result of the review, the complainant's position was abolished and I understand that he was made redundant and the duties of his position were transferred to another position.
4. On 16 October 2003, the complainant applied to the agency, under the FOI Act, for access to a copy of the Report and the file maintained by the agency in relation to the review of the Branch. On 12 November 2003, the agency granted the complainant access in full to five documents and access to edited two documents (identified by the agency as Documents 4 and 7) and refused him access to a copy of the Report (identified by the agency as Document 8). The agency claimed that the information deleted from the Documents 4 and 7, and all of the information recorded in Document 8, was exempt under clauses 3(1) and 11(1)(d) of Schedule 1 to the FOI Act.
5. After receiving the agency's initial decision on access, on 15 November 2003 the complainant contacted the agency's FOI Co-ordinator and queried with her whether all of the requested documents had been identified by the agency. On 18 November 2003, the agency's FOI Co-ordinator advised the complainant that, following further searches, she had located four additional documents of the kind requested and granted the complainant full access to those four documents.
6. On 1 December 2003, the complainant applied to the agency for internal review of the initial decision on access. Amongst other things, the complainant claimed that there were other documents relating to the review of the Branch which should exist at the agency and which had not then been identified by the agency. The complainant informed the agency that he had been told by a senior officer of the agency that the decision to review the Branch was a decision of the Board of the agency but there were no documents relating to that decision among the documents identified by the agency. The complainant also submitted that, given there had been a transfer

of activities from one Branch of the agency to another Branch he assumed that the agency would have held documentation supporting that transfer process. The complainant submitted that those kinds of additional documents fell within the ambit of his access application.

7. On 11 December 2003, the agency's internal review decision-maker notified the complainant of the decision on internal review. The agency's internal review decision-maker confirmed the initial decision with respect to Documents 4, 7 and 8. However, she also advised the complainant that, as a result of a comprehensive search undertaken to locate all relevant documents of the kind described by the complainant, one additional document (Document 13) had been identified by the agency as falling within the scope of his access application.
8. The agency gave the complainant access to an edited copy of Document 13, claiming that the information deleted from that document was also exempt under clause 3(1) of Schedule 1 to the FOI Act. Although not stated in the notice of decision on internal review given to the complainant by the agency, it seems the agency's internal review decision-maker effectively denied the complainant access to any further documents of the kind he described in his application for internal review, on the ground that those documents do not exist.
9. On 17 December 2003, the complainant made a complaint to the Information Commissioner, seeking external review of the agency's decision to grant him access to edited copies of Documents 4, 7 and 13 and to refuse him access to Document 8. The complainant also submitted that there were additional documents relating to the review of the Branch and the agency's decision to abolish his substantive position which should exist at the agency but which had not been identified by the agency as documents falling within the scope of his access application.

REVIEW BY THE A/INFORMATION COMMISSIONER

10. On 18 December 2003, I notified the agency that I had received this complaint and, pursuant to ss. 72 and 75 of the FOI Act, I required the agency to produce to me, for my examination, Documents 4, 7, 8 and 13 together with the FOI file maintained by the agency in respect of the complainant's access application.
11. Following my examination of those documents and the agency's FOI file, consultations and negotiations took place between my office, the agency and the complainant, in an endeavour to resolve this complaint by conciliation between the parties. As a result of those consultations and negotiations, the agency withdrew its claims for exemption for Documents 7 and 13 and released copies of those documents to the complainant. However, the agency maintained its claims for exemption for Documents 4 and 8.
12. In addition, during that phase of the external review process, my office made further inquiries with the agency in relation to the complainant's claims that

additional documents relating to the review of the Branch and the decision to abolish his substantive position should exist at the agency. In response to those inquiries, the agency informed me that the restructure process did not involve the Board, but was carried out on a divisional basis; that all communications involving the transfer of the responsibilities of the complainant's position were verbal communications; that there were no diary records kept by the General Manager and the Branch Manager for the meetings those officers attended; and that no notes were taken at any of the meetings regarding the transfer of the responsibilities of the complainant's position to the Legal and Risk Management Branch of the agency.

13. At the conclusion of the conciliation process and after considering all of the material then before me, on 5 May 2004 I informed the parties in writing of my preliminary view of this complaint and my reasons for that view. It was my preliminary view, on the basis of the evidence then before me, that Documents 4 and 8 were not exempt under clauses 3(1) and 11(1)(d) of Schedule 1 to the FOI Act, as claimed by the agency.
14. It was also my preliminary view that all reasonable steps had been taken by the agency to locate the requested documents but that additional documents of the kind which the complainant claimed should exist at the agency either could not be found or did not exist. I invited the complainant to reconsider his complaint in relation to this aspect of the matter or to provide me with further evidence to support his claim that additional documents of the kind described exist or should exist at the agency.
15. The agency accepted my preliminary view of this complaint and withdrew its claims for exemption for Documents 4 and 8 and gave the complainant access in full to both documents. However, the complainant advised me that he maintained his claim that additional documents of the kind he had previously described should exist at the agency and he made some further submissions to me in that regard. Accordingly, the only question for my determination in this complaint is whether the agency's decision to refuse the complainant access, on the basis that some of the requested documents either do not exist or cannot be found, was justified.

SUFFICIENCY OF SEARCHES

16. 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:

“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.”*

Documents that cannot be found or do not exist

17. On a number of occasions when dealing with complaints about access to documents under the FOI Act, the former Information Commissioner (‘the former Commissioner’) considered claims about “missing” documents (see: *Re Doohan and Police Force of Western Australia* [1994] WAICmr 13; *Re Oset and Ministry of the Premier and Cabinet* [1994] WAICmr 14 and *Re Barrett and Police Force of Western Australia* [1995] WAICmr 32.
18. The former Commissioner expressed the view that 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, of necessity, limited to inquiring into the adequacy of the searches conducted by the agency. I agree with the former Commissioner’s views in that regard.
19. If a complainant raises the issue of the existence of additional documents which have not been identified by the agency, in my view, 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. In circumstances where that question is answered in the affirmative, the second question is whether the agency has taken all reasonable steps to find those documents.
 - (a) ***Are there reasonable grounds to believe that additional documents exist or should exist?***
20. In his letter seeking external review of the agency’s decision on access, the complainant observed that the agency had not identified any documents which suggested that the decision to conduct the review of the Branch and to transfer the responsibilities of the complainant’s position to the Legal and Risk Management Branch of the agency was a decision of the Board of the agency. The complainant holds the view that, as he attended a meeting in which he was advised that the review of the Branch and the abolition of his position were consistent with a “...*Corporate re-think*” and he had been told that the

decision was a Board decision, there should be Board minutes and records of Board meetings in which those decisions were considered.

21. In his submissions in response to my preliminary view, the complainant submitted that he was informed on at least three separate occasions that the decision was a Board decision and he provided me with a copy of an email dated 24 June 2003 between two officers of the agency, which states: "...*the restructure was decided upon and agreed to by the MD (business decision).*" However, the complainant also submitted that he appreciated the fact that there may not be any Board papers or minutes because he had believed, all along, that there was no such Board decision and he also believed that the decision to restructure the Branch and make his position redundant was made at Branch level.
22. I have considered those submissions. In my view, nothing provided by the complainant evidences or establishes that there was a meeting or meetings of the Board of the agency and a consequent decision by the Board of the agency to the restructure of the Branch and to make the complainant's position redundant, and there is nothing in any of the material before me which evidences such a meeting or decision. Moreover, the email provided to me by the complainant appears to indicate that the restructure of the Branch was decided and agreed to by a senior officer of the agency and not the Board.
23. As noted in paragraph 12, I am advised by the agency that the restructure process did not involve the Board, but was a restructure carried out on a divisional basis, because the Branch was then part of the Water Technologies Division of the agency. The General Manager of that Division and the Branch Manager were involved in discussions regarding the restructure. I am further advised by the agency that all communications involving the transfer of the responsibilities from the complainant's position were verbal communications; that no diary records were kept by the General Manager and the Branch Manager of the meetings those officers attended; and that no notes were taken at the meetings regarding the shifting of responsibilities of the Intellectual Property Unit to the Legal and Risk Management Branch.
24. The agency confirmed that it holds only one file in relation to the review and restructure of the Branch. The original of that file was produced to me for my examination. It is a manila folder containing eight documents, copies of which have already been released to the complainant by the agency. I have examined those documents and there is nothing on the face of any of those documents to indicate that any other documents of the kind described by the complainant exist or should exist at the agency. The agency has also advised my office that those documents are the only documents in its possession which come within the ambit of the complainant's access application.
25. My office also made further inquiries into the nature and extent of the searches conducted by the agency in relation to this aspect of the complaint. The adequacy of the efforts made by an agency to locate documents the subject of an access application is to be judged by having regard to what was reasonable in the circumstances (see: *Re Anti-Fluoridation Association of Victoria and*

Secretary to Department of Health (1985) 8 ALD 163, at 170). In this instance, I am informed by the agency that physical searches of the agency's file relating to the review and restructure of the Branch and of the diaries of the officers involved in the restructure were conducted by the FOI Coordinator. Those searches did not locate any documents of the kind requested, other than those documents which have already been provided to the complainant by the agency.

26. In ordinary circumstances, I would have expected, as a matter of good administrative practice – and in circumstances where an agency has decided to engage the services of external consultants to conduct a business analysis review of a particular Branch of the agency, with a view to defining the future resource requirements for the effective management of research and innovation by the Branch and to identify options for change within the Branch – that there would be some further documentation concerning that review.
27. However, despite the inquiries made by my office, there is nothing before me to indicate that any further documents of the kind described by the complainant exist within the agency, and it appears that he has already been given access to all of the documents identified by the agency as falling within the scope of his access application. Further, it appears to me, from the comments made to me by the complainant in his submissions in response to my preliminary view, that he accepts that the restructure process did not involve the Board and that, accordingly, there would not be any Board papers or minutes relating to the restructure of the Branch.
28. One of the stated objects of the FOI Act is “... *to make the persons and bodies that are responsible for State and local government more accountable to the public*” (s.3(1)(b)). One of the means of achieving that accountability is the creation of a general right of access to State and local government documents (ss.3(2)(a) and 10). If government decisions – particularly those which directly affect individuals – and the processes by which those decisions were made are not properly documented, the accountability that the FOI Act is designed to further is significantly diminished. A lack of proper records is also an inadequate administrative process which is inconsistent with the requirement of the *State Records Act 2000* that each agency have, and comply with, a record-keeping plan that, among other things, ensures that the records kept by an agency properly and adequately record the performance of its functions (s.16(2)(b)). However, it is not a function of the Information Commissioner to review agencies' record-keeping practices or to direct an agency as to what records it should keep. The FOI Act is concerned with access to the records that exist.
29. I required the agency to conduct further searches, even though there did not appear to be any evidence that additional documents of the kind requested by the complainant exist at the agency. Based on all the information before me, I am, satisfied that the searches conducted by the agency to locate any documents within the ambit of the complainant's access application were, in all the circumstances, reasonable.

30. In the present case, although I am of the view that – as a matter of proper administrative practice – further documents should exist, my role is to inquire whether all reasonable steps have been taken to locate the required documents but they either exist but cannot be found or do not exist.
31. In this instance, I am satisfied that the agency has now taken all reasonable steps to locate the requested documents and that nothing more could be done in order to satisfy the access application. I am also satisfied that the documents which the complainant initially believed should exist, do not exist and never did.
32. Accordingly, in respect of those documents, I am of the view that the agency's decision under s.26 of the FOI Act to refuse access on the ground that those documents do not exist or cannot be found was justified.
