

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

**File Ref: F0612000
Decision Ref: D0342000**

Participants: **Geoffrey Raymond Moran**
Complainant

- and -

Minister for Works; Services
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to appointment of independent consultant – reports prepared by independent consultant – section 26 – whether documents exist – whether all reasonable searches undertaken by the agency.

Freedom of Information Act 1992 (WA) s.26.

DECISION

I confirm the decision of the Minister to refuse access to the requested documents pursuant to s.26 of the Freedom of Information Act 1992 on the ground that the documents either do not exist or cannot be found.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

10 July 2000

REASONS FOR DECISION

1. This is an application for external review arising from a decision made by the Minister for Works; Services ('the Minister') to refuse access to documents requested by Mr Moran ('the complainant') under s.26 of the *Freedom of Information Act 1992* ('the FOI Act') on the ground either that the documents do not exist or cannot be found.
2. The complainant is a former director of Lynch Interiors Pty Ltd, a company now in liquidation. In 1995, Lynch Interiors Pty Ltd was contracted by the Building Management Authority (BMA), now the Department of Contract and Management Services (CAMS), to repair the roof of the Pinjarra Hospital. Before the repairs were complete, rain caused damage to the interior of the building resulting in a dispute between Lynch Interiors Pty Ltd and the BMA. I also understand that other parties became involved in that dispute.
3. At that time, the then Minister for Works; Services, the Hon K J Minson MLA, appointed Mr John Foster as an adviser to assist him in resolving disputes between public sector agencies and private contractors. The then Minister sought Mr Foster's advice in respect of the dispute with Lynch Interiors Pty Ltd. I understand that Mr Foster inquired into the dispute and reported his findings to the then Minister.
4. On 30 November 1999, the complainant made an application to the Minister seeking access under the FOI Act to various documents relating to the inquiry conducted by Mr Foster. Specifically, access to the following was sought:
 - documents relating to the engagement of Mr Foster, including any that would show who suggested and recommended his engagement;
 - the then Minister's brief to Mr Foster;
 - any diary notes made by the then Minister of his meetings with Mr Foster;
 - the report of Mr Foster;
 - invoices and payments made to Mr Foster;
 - correspondence from the then Minister to Mr Foster; and
 - correspondence from the then Minister to a third party.
5. The complainant was granted access to six documents. Four of those documents are copies of letters to and from the third party; one is a letter from Mr Foster to the then Minister; and one is described as an overview of Mr Foster's work achievements.
6. On 2 March 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of the Minister's decision and claimed that additional documents should exist.

REVIEW BY THE INFORMATION COMMISSIONER

Documents that do not exist or cannot be found

7. Section 26(1) of the FOI Act provides that an agency may advise an applicant that it is not possible to give access to a document if all reasonable steps have been taken to find the document and the agency is satisfied that the document either does not exist or cannot be found. Further, the sending of a notice under s.26(1) is to be regarded as a decision to refuse access to a document. Although it is not specifically stated in the Minister's notice of decision, it is implicit in the decision - and subsequent inquiries have confirmed - that the decision dealt with all the documents that were found, and was on the basis that no other documents were held by the Minister that would fall within the ambit of the complainant's access application. On that basis, I accepted the complaint as, effectively, a complaint against a decision made under s.26 of the FOI Act which is deemed to be a decision to refuse access to the other documents described in the complainant's access application.
8. Section 26 of the FOI Act deals with the requirements of an agency in circumstances where it is unable to locate the documents sought by an access applicant and provides:
- “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.”*
9. I have discussed my view of the requirements of s.26 in previous decisions relating to documents that cannot be found. I remain of the view 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. In circumstances 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.

10. 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 be conducted if necessary.

The existence of the documents

11. I obtained the file maintained by the Minister in respect of the complainant's access application. Inquiries were made to determine whether the documents described in the access application exist or should exist, specifically, documents relating to the engagement of Mr Foster, the then Minister's brief to Mr Foster, diary notes made by the then Minister of his meetings with Mr Foster, and the report of Mr Foster.

Inquiries made with the Hon K J Minson MLA

12. Inquiries were made with the Hon K J Minson MLA. He informed my office that his memory regarding the details of the matter is sketchy and unreliable. Although he cannot recall a written request to Mr Foster for advice, he imagines that he would have outlined the terms of reference for framing such advice in writing. I am advised that, occasionally, such matters were referred to his Ministerial staff for attention after he had advised his staff of the substance of what it was that he wished to know.
13. Mr Minson advised my office that he recalled meeting with Mr Foster where, he recalled, Mr Foster referred to notes. It is the recollection of Mr Minson that he received a verbal briefing from Mr Foster. Mr Minson informs me that he did not take any notes during the course of those meetings, nor did he make any diary notes. However, the relevant staff member who would have been present may have done so. I understand that the relevant staff member worked in the private sector prior to his employment in Mr Minson's Ministerial office, and he has since returned to the private sector.
14. Mr Minson informed my office that it was not his practice to instruct his staff as to how and where records were to be maintained. Further, in respect of this matter, whilst he has no direct knowledge as to where the relevant records are kept, he suggested CAMS as being the most likely place to hold such records on file.

Inquiries made with Mr Foster

15. Mr Foster informs me that he is unable to locate his files relating to Lynch Interiors Pty Ltd, having moved house twice in the intervening years. As he has misplaced his files, he relies on his memory of the events in question. Mr Foster believes that the request for his services was made in writing. His recollection is that the terms of reference included defining the particular complaint between Lynch Interiors Pty Ltd and the BMA. He interviewed a number of people and took notes of his discussions. All of those documents are in his missing file. Mr Foster also informs me that he has no computer files

relating to this matter because the hard drive on his computer crashed about 2 years ago.

16. Mr Foster informs me that he submitted a written progress report to the then Minister describing the work he had performed and the persons he had interviewed. He informs me that he presented the then Minister with a Memorandum of Fees for the work he had performed and subsequently he received payment from CAMS. Mr Foster informs me that he did not prepare a final written report, as he did not complete the work. Instead, he proposed a method of conciliating the dispute involving Lynch Interiors Pty Ltd and he prepared written terms for the conciliation and provided that document to the then Minister. Mr Foster recalled that he prepared notes relating to the proposed conciliation, but that those notes were his own. Mr Foster informs me that he made no findings of fact and expressed no opinion on the matters in dispute.

Inquiries with CAMS

17. Inquiries were also made with CAMS as the agency most likely to hold the relevant documents. CAMS produced to my Investigations Officer a number of files containing documents relevant to the dispute with Lynch Interiors Pty Ltd. My Investigations Officer examined those files and found some documents referring to Mr Foster and his investigation and recommendations. However, my Investigations Officer could not find any documents on those files from either the then Minister or Mr Foster that came within the ambit of the complainant's access application.

Findings

18. Based on the inquiries conducted by my Investigations Officer, it is my view that the diary notes referred to by the complainant in his access application do not exist. Mr Minson informs me that he did not make any notes and, if his assistant took notes, those documents should be filed either in the office of the Minister or in CAMS. However, searches conducted by my Investigations Officer have not found those documents, or any material to suggest that the notes exist.
19. It is also my opinion, based on the inquiries that have been conducted by my office, that Mr Foster did not prepare a final report. However, I accept his claim that he prepared at least one interim report in writing for the then Minister. Accordingly, I consider that an interim report by Mr Foster should exist and should be held, either in the Minister's office or, more likely, in CAMS.
20. I am also of the view that documents relating to the engagement of Mr Foster and the then Minister's brief to Mr Foster in respect of the Lynch Interiors Pty Ltd dispute should exist. In my experience it is - and I consider that it would be - normal practice in public administration for the engagement of external consultants on a fee for service basis to be properly documented. Clearly, there is an accountability issue whenever public monies are used and I would expect there to be on file documents that would satisfy normal audit requirements. From the inquiries made by my office, it appears that documents relating to the

engagement of Mr Foster and the particular brief that he was given in respect of Lynch Interiors Pty Ltd are probably contained in Mr Foster's missing file. However, I would expect copies of those documents to also be held either in the office of the Minister or in CAMS.

Searches

21. My Investigations Officer attended at the office of the Minister and met with Mr Richard Lange, the Minister's FOI coordinator. Mr Lange demonstrated the searches he had conducted to determine whether the documents described in the complainant's access application were held in that office.
22. I am advised that, after the Minister's office had received the complainant's access application, a physical search was made of the records currently held in that office. One box of documents was located. My Investigations Officer also examined the contents of that box. However, the only documents in that box that fall within the ambit of the access application are the documents that have already been provided to the complainant.
23. At my request, additional searches were also conducted by CAMS. My Investigations Officer inspected the documents identified and held by CAMS. None of the files examined contains documents from the then Minister or from Mr Foster, other than those already supplied to the complainant.

Conclusion

24. For the reasons given above, I am satisfied that none of the other documents described in the complainant's access application exist in the office of the Minister. However, I consider that documents of that kind should exist and the most likely place where those documents would be filed is at CAMS. In my view, the complainant's access application could have been, and probably should have been, partially transferred to CAMS for that agency to deal with part of it. In any event, as the application was not transferred to CAMS, my office has made the appropriate inquiries with that agency.
25. I consider that copies of some of the requested documents may exist elsewhere specifically they should be in the possession of Mr Foster. However, for the reasons given, Mr Foster cannot locate those documents and, in any event, the documents in his possession may not be documents of an agency and, therefore, may not be accessible under the FOI Act.
26. Having reviewed the searches undertaken by the Minister and by CAMS, I have not required the Minister to conduct any further searches. I am satisfied that all reasonable steps to find the requested documents have been taken and that proper searches have been conducted, but that no further documents can be found. Accordingly, I confirm the decision of the Minister to refuse access to the documents on the ground either that the documents do not exist or cannot be found.