

BOLAND AND MELVILLE

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

**File Ref: 96134
Decision Ref: D05396**

Participants:

Gary Boland
Complainant

- and -

City of Melville
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - building plans - section 26 - documents either in the possession of the agency but cannot be found or do not exist - sufficiency of search - whether agency has taken reasonable steps to find documents - role of the Information Commissioner.

Freedom of Information Act 1992 (WA) ss. 26, 68(1), 72(1)(a) & 72(1)(b).

DECISION

The decision of the agency is confirmed. The agency has taken all reasonable steps to find the documents and they are either in the possession of the agency but cannot be found or they do not exist.

D A WOOKEY
A/INFORMATION COMMISSIONER

11th October 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the City of Melville ('the agency') to refuse Mr Boland ('the complainant') access to a document of the agency requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 3 July 1996 the complainant applied to the agency for access to certain documents of the agency concerning the specifications of a doorway, and the floor in relation to it, in a particular premises in which the complainant alleges that he was injured as a result of a fall.
3. In particular, the complainant requested access to "*...the Councils original approval of the building as regards the doorway, identified in the attached sketch, as at the time of construction and applications subsequent to this. Also the original council approval of the floor height in regard to this particular doorway at the time of construction and applications subsequent to this.*" The complainant also specified in his access application that his requested was "*...not for the total plans to be made available to [him] just the specifics of this doorway and to the floor in relation to it.*"
4. On 28 August 1996, the Manager, Administrative Services, of the agency advised the complainant that, despite extensive searching for the requested documents, the agency was unable to locate a copy of the plans sought by the complainant. The agency advised the complainant that, pursuant to section 26 of the FOI Act, the agency's inability to locate the documents is treated as though access to the document is refused and that a right of review arose.
5. On the same day as receiving that advice, the complainant applied to the agency for internal review of its decision on access and, the following day, the Chief Executive Officer of the agency confirmed the agency's initial decision. The Chief Executive Officer informed the complainant that he had examined both the complainant's access application and the initial decision and had discussed the matter with appropriate staff of the agency. He expressed his disappointment that the agency's records management system could not locate the plans but informed the complainant that he was comfortable that the staff had taken every reasonable measure, being the usual methods of accessing that particular series of records, to locate the plans requested.
6. The Chief Executive Officer went on to inform the complainant that the agency could manually search through "*...the thousands of approvals that have been issued since [the] particular unit was constructed back in the early 1980's.*" The complainant was informed that the agency would be prepared to undertake that manual research for a charge, on a recovery basis, of \$240 per day. The agency estimated that that exercise could take anything up to 15 days and, accordingly, the charge could be as much as \$3,600 with no guarantee that the

document would be located. The complainant was requested to submit a deposit of \$900, being 25% of the maximum amount that would be charged if he wished the agency to proceed to conduct the search.

7. On 3 September 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the decision of the agency.

REVIEW BY THE INFORMATION COMMISSIONER

8. On 5 September 1996, pursuant to section 68(1) of the FOI Act, the agency was notified of the complaint and, pursuant to section 72(1)(a) and (b), required to provide a detailed summary of all the searches undertaken and to produce the agency's FOI file maintained in respect of the complainant's access application. On 11 September 1996, the agency's file was produced together with a letter from Mr Neil Bolton, the Acting Chief Executive Officer of the agency, directing the Information Commissioner to two memoranda on the agency's file, outlining the agency's attempts to locate the documents. In that letter, the Acting Chief Executive Officer also indicated that, even if the document were located, the agency would not necessarily provide access to it, but may claim exemption.
9. Following discussions with the complainant, an Investigations Officer from this office met with officers of the agency in order to make inquiries as to the searches undertaken by the agency in order to locate the requested documents. The parties were subsequently advised in writing of the Information Commissioner's preliminary view in this matter, which was that the agency had taken all reasonable steps to find the document, but that it could not be found. The parties were informed, in detail, of the reasons for that view and the complainant was invited to reconsider his complaint. The complainant subsequently advised that he wished to pursue the matter to a formal decision.
10. The issue for my determination, therefore, is whether the agency's decision to refuse access under section 26, on the basis that the documents cannot be found, was justified. That entails, primarily, a determination of whether the searches conducted by the agency in order to locate the requested documents were sufficient in the circumstances.

THE SUFFICIENCY OF THE SEARCHES CONDUCTED BY THE AGENCY

11. Section 26 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:

“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”.*

12. In dealing with a complaint against a decision of an agency to refuse access on the basis that documents either do not exist or cannot be found, I consider that there are two questions that must be answered. The first of those is whether there are reasonable grounds to believe that the requested document exists or should exist and is, or should be, held by the agency. In circumstances in which 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 the document and is satisfied that it is in the agency's possession but cannot be found or that it does not exist.
13. The Information Commissioner has said, in a number of previous formal decisions, that she does not consider that it is the Information Commissioner's function to physically search for the requested documents on behalf of an access applicant, nor to examine in detail the manner in which an agency organises or maintains its record-keeping system. I respectfully agree with that view. If the Information Commissioner is satisfied that the requested documents exist, or should exist, within the agency, it is the Information Commissioner's responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches, if necessary, in order to satisfy herself that the agency has acted in accordance with its obligations under the FOI Act.
14. In this instance, the agency has acknowledged that the requested documents should exist and should be held by the agency. However, for a number of reasons, the agency was unable to locate the requested documents after conducting what the agency submits to be reasonable searches in an endeavour to locate them. In the circumstances, I am satisfied that it is reasonable to believe that the requested documents exist or should exist and should be located in the agency.

15. Pursuant to section 26(2) of the FOI Act, the Information Commissioner may require an agency to conduct further searches for the requested documents, where a complaint has been accepted under Part 4 of the FOI Act. However, before such action is taken, I consider that I must be satisfied that the agency has not conducted a reasonable search in the first instance.

THE AGENCY'S SEARCHES

16. During his visit to the agency, the Information Commissioner's Investigations Officer ('the Investigations Officer') was informed that, if the requested documents exist in the agency, they should be located either on the property file in the central records area, in the building services section or in a separate storage facility utilised by the building services section of the agency. However, if the documents were located elsewhere in the agency, it would not be possible to identify and locate the documents as there is no recording system in place for such information.
17. In these circumstances, the officers who conducted the searches for the documents limited their enquiries to the areas described above. In a document on the agency's file concerning the complainant's access application, Mr Mark Caporn, Records Services Coordinator, of the agency summarized the searches undertaken by officers in his section as follows:

"An initial review of records regarding this issue was made on 24th July 1996 to discover relevant file(s) or correspondence regarding the issue. Research through the property files for the Melville Trade Centre was undertaken on the 6th, 7th and 9th of August 1996. The property files included M76/3 (3 Marshall Road, Myaree) volumes 1 to 5; M76/3 (5) (Shop 5, 3 Marshall Road); M76/5 (5 Marshall Road).

The search looked for any documentation on the shop in question, and the path leading from the shop. In particular any reference to original or subsequent approvals, and copies of plans of doorway and pathway. The search did not result in any such documentation being found."

18. In another document on that file, Mr Murray Walker, Manager Building Services at the agency summarized the searches undertaken by officers in his section as follows:

"..[A] search was conducted to find building plans for the Melville Trade Centre in Leach Highway, Myaree.

The search took place during the week commencing 12 August 1996 (approx) and the people who undertook the search were Tony Capobianco, Building Services Co-ordinator and Liz Holliday, Customer Services Officer.

Both persons were instructed to locate the building licence number, which was achieved and then search for the building plans stored at the Council Depot. It is our standard policy to search 100 records above and 100 records below the licence that is required, in case the plans have been filed in the wrong location.

It is pointed out that there is in excess of 30,000 records kept in the storage area at the Depot and if a plan is inadvertently refiled in the wrong location, it can involve a very lengthy search which may or may not locate the required file.

From time to time, some plans have been mislaid and never been found due to human error.”

19. It was explained to the Investigations Officer that, when a person sought to construct or amend any building in the City of Melville, that person is required to lodge for the agency two sets of plans in order to have the building license processed. Once the building license is issued, one set of plans is provided to the builder and the other is retained by the agency in its record-keeping system. The set of plans retained by the agency is kept within the normal office filing system for approximately one year, until they are no longer of use and unlikely to be referred to again.
20. Thereafter certain parts of the plans are transferred onto microfiche. My officer was informed that it is usual that the site plan and the floor plan are transferred to microfiche and, if possible, some other of the plans elevations. I informed that it is not usual, when there are large constructions, for the agency to have every part of the plans transferred to microfiche.
21. The “hard copy” plans are then transferred to a storage facility, where they are retained for approximately 3 to 4 years, depending upon the amount of space available. After that period of time, they are generally transferred to the Council’s depot where they are retained indefinitely. I am informed that there is no formal policy for the disposal and retention of documents of that kind. I am also informed that, on occasion, over the years, some documents of that kind have been misplaced, damaged or destroyed, and there is no record of those documents having been misplaced, damaged or destroyed.
22. I am advised that the plans the complainant seeks are approximately 15 years old and, if the documents exist in the agency, they should be held in the agency’s storage facility located at its depot at a site separate to the agency’s offices. The plans are stored in licence number order.
23. I am also advised that the only way of locating a plan is by the licence number. For a plan lodged at the agency in 1981, or thereabouts, there is only one reference source available to establish the licence number. That reference source is a series of microfiche cards maintained in the building services area of the agency. The microfiche cards are stored in alphabetical street name order.

24. It was explained to the Investigations Officer that the search of the depot was conducted by, firstly, searching the microfiche files for the documents relating to the relevant property. Those were located and viewed by an officer of the agency, but that officer was unable to locate any part of the plans which identified the particular part of the development with which the complainant is concerned.
25. Therefore, that officer attended at the Council's depot and physically searched for the hard copy of the plans which he expected to be held there. The officer searched for the plans relating to the relevant license numbers and located some plans relating to the property in question. However, none of those concerned the relevant unit of the property. One hundred plans either side of where the documents should have been located were searched but still none was found which related to the property. As the documents were not located where they should have been, there was no way of ascertaining where they might be located in the large volume of documents stored at the depot.
26. Mr Walker advised the Investigations Officer that, although the record-keeping practices of the agency may appear to be inadequate, the agency does not place a high priority on documents of this nature once the initial use for those plans has been finalised. Although I do not condone it, the *ad hoc* manner in which plans were stored around the time the requested document would have been received into the agency is not unusual. However, I am informed by the agency that, in recent years, the agency's ability to locate similar documents has been enhanced by a more controlled recording and storage policy and the introduction of a register.

FINDINGS

27. On the basis of all the evidence before me, I find that the agency has taken all reasonable steps to locate the documents and that it is likely that the documents are in the agency's possession, but that they cannot be found. The agency is not required by the FOI Act to take every possible step to locate a document; it is required, rather, to take all reasonable steps. I consider the searches that were undertaken to locate the documents to constitute all the reasonable steps that the agency could be expected to take.
28. I do not consider that it would be reasonable to expect the agency, having conducted the searches it has conducted, to manually search the large volume of documents in its possession in the hope that the requested documents may be located. In my view, that would represent an unreasonable diversion of the agency's resources in the circumstances.

OTHER MATTERS RAISED BY THE COMPLAINANT

29. Although I consider it unfortunate, to say the least, that the agency's record-keeping system is such that it has been unable to locate the documents,

there is no evidence before me that the agency has deliberately concealed, destroyed or disposed of the documents for the purpose of preventing it from being able to give access to the documents.

30. The complainant also suggested that the agency should be encouraged to obtain a copy of the plans from elsewhere in order to satisfy his access application. The agency is not required, and cannot be required, to do so under the FOI Act. The FOI Act requires an agency only to deal with documents of the agency, as defined in the FOI Act.
31. I refer, finally, to the agency's offer to conduct further searches for the documents, at a cost to the complainant. The complainant has submitted that an agency may not impose a charge for searches for documents conducted in the course of dealing with an access application. That is also my view. However, the charge the agency proposes is not for searches it is required by the FOI Act to undertake. I have determined that the agency has taken all reasonable steps to locate the documents, but was unable to do so and is not, therefore, required to conduct any further searches for the documents, and I consider the agency has therefore discharged its obligations under the FOI Act. In those circumstances, the agency's offer to conduct additional manual searches for a charge is an offer made outside the FOI process and is a matter between the parties and not within the Information Commissioner's jurisdiction.
