

**Decision D0062011 - Published in note form only**

***Re Treby and Department of Local Government* [2011] WAICmr 6**

**Date of Decision: 29 March 2011**

***Freedom of Information Act 1992: sections 13(3), 15, 26(1), 30(f), 43 and 102(1); Schedule 1, clauses 3(1) and 6(1)***

The complainant – a local government councillor – applied to the Department of the Premier and Cabinet (‘DPC’) for access under the *Freedom of Information Act 1992* (‘the FOI Act’) to various documents relating to him and another councillor. DPC transferred the complainant’s application to the Minister for Local Government (‘the Minister’) under s.15 of the FOI Act. As the Minister was unable to locate the requested documents, the Minister transferred the application to the Department of Local Government (‘the agency’) under s.15.

The agency refused the complainant access to the requested documents, without identifying the documents and without noting the number of documents identified, on the ground those documents were exempt under clause 6 of Schedule 1 to the FOI Act (deliberative processes of an agency). The complainant applied for internal review of the agency’s decision. As the complainant did not receive the agency’s internal review decision within the time prescribed by the FOI Act, the agency was taken to have confirmed its decision to refuse access (s.43) and the complainant applied to the Information Commissioner for external review of the agency’s decision.

Following receipt of the complaint, the Commissioner obtained the requested documents from the agency, together with the FOI file relating to the complainant’s access application. After examining that material, one of the Commissioner’s officers informed the agency that it had not met its obligations under s.102(1) of the FOI Act to justify its claim that the requested documents are exempt under clause 6. Subsequently, the agency withdrew that exemption claim and, in substitution, claimed that the requested documents are exempt under clause 3 of Schedule 1 to the FOI Act.

The agency had identified a substantial number of documents within the scope of the complainant’s access application. Following further discussions with the Commissioner’s officer, the complainant clarified the particular type of documents to which he sought access and, as a result, significantly reduced the scope of the requested documents to those within a particular one week period (‘the requested documents’). At that point, the exemption claims of the agency were no longer in dispute.

The Commissioner’s office asked the agency to conduct further searches for the requested documents. As those further searches did not locate any documents within the reduced date range – being the amended scope of the complainant’s application – the Commissioner proceeded on the basis that the agency had made a deemed decision to refuse access to the requested documents under s.26 of the FOI Act.

Section 26 provides that an agency may refuse access to a document if the agency is satisfied that all reasonable steps have been taken to find the document and the document is either in the agency’s possession but cannot be found or does not exist.

After considering the information then before him, including the further searches and inquiries conducted by the agency, the Commissioner provided the complainant and the agency with a letter setting out his preliminary view of the complaint. The Commissioner was satisfied that the agency had taken all reasonable steps to locate the requested documents and that those documents either do not exist or are in the agency's possession but cannot be found. Accordingly, the Commissioner did not require the agency to conduct any further searches for the requested documents. However, the Commissioner drew to the agency's attention a number of procedural matters concerning the manner in which it had dealt with the application, including the fact that the agency's notice of decision did not comply with the requirements of s.30(f) of the FOI Act and the fact that the agency failed to provide its notice of decision to the complainant within the permitted period (s.13(3)).

The complainant was invited to provide the Commissioner with further submissions or to withdraw his complaint. The complainant did not withdraw the complaint but made no further submissions. As there was no new material before him, the Commissioner was not dissuaded from his preliminary view and confirmed the agency's deemed decision to refuse access to the requested documents under s.26 of the FOI Act.