

**Decision D0062015 – Published in note form only**

***Re Truscott and Department for Child Protection and Family Support [2015] WAICmr 6***

**Date of Decision: 8 April 2015**

***Freedom of Information Act 1992: section 26***

On 4 March 2013, Mr Stephen Truscott (**the complainant**) applied to the Department for Child Protection and Family Support (**the agency**), formerly known as the Department for Child Protection, under the *Freedom of Information Act 1992* (**the FOI Act**) for access to documents. Specifically, the complainant sought access to a copy of a written investigation report and copies of statements made by agency officers about the complainant's actions as an officer of the agency. The scope of the access application excluded those documents to which the complainant had already been given access by the agency.

By decision dated 30 April 2013, the agency gave the complainant access to two documents, one of which was edited to delete personal information about third parties and information outside of the scope of the access application. The complainant applied for internal review of the agency's decision on the basis that additional documents exist within the scope of his access application (**the requested documents**). On internal review, the agency effectively refused access to the requested documents under section 26 of the FOI Act on the basis that all reasonable steps had been taken to find those documents but they cannot be found or do not exist. The complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

Following receipt of the complaint, the Commissioner obtained a copy of the FOI file maintained by the agency in respect of the complainant's access application.

The Commissioner required the parties to attend a compulsory conciliation conference in this matter pursuant to sections 70 and 71 of the FOI Act. Following the conciliation conference, the agency made further inquiries with relevant agency officers regarding the existence of the requested documents. The agency provided the complainant with a summary of those inquiries. However, the complainant remained dissatisfied and the matter was not resolved by conciliation.

Section 26 of the FOI Act 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 agency is satisfied that the document is either in the agency's possession but cannot be found or does not exist. The Commissioner considers that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the requested documents exist or should exist and second, whether the requested documents are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find those documents.

The complainant made detailed submissions to support his claim that the requested documents should exist. In summary, the complainant claimed that there was evidence to prove that the requested documents exist and that the agency had not taken all reasonable steps to find those documents because it had not made inquiries with all of the relevant

officers. He also claimed that the agency had deliberately concealed or destroyed documents in order to prevent disclosure of those documents to him under the FOI Act.

The agency accepted that the wording of certain agency documents implied that the requested documents may exist. However, it submitted that, based on its inquiries with the relevant agency officers, the requested documents did not exist. It advised that the relevant agency officers confirmed that they had made verbal comments, not written statements, about the complainant and a written investigation report was not created. The agency also provided details about the searches conducted to find the requested documents.

On 24 February 2015, after considering all of the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. The Commissioner did not accept that the complainant's submissions proved that the requested documents exist. However, he did accept that the evidence provided by the complainant gave reasonable grounds to believe that the requested documents may exist. On that basis, the Commissioner considered whether the agency had taken all reasonable steps to find the requested documents. The Commissioner found no evidence to support the complainant's claim that the agency had attempted to conceal or destroy documents.

In the circumstances of the case, it was the Commissioner's preliminary view that the agency had taken all reasonable steps to find the requested documents but those documents cannot be found or do not exist. The complainant did not accept the Commissioner's preliminary view and made further submissions about the existence of the requested documents.

The Commissioner considered that the complainant's further submissions provided no new evidence that the requested documents should exist or that further searches should be made for them.

Having reviewed all of the material before him, the Commissioner was not dissuaded from his preliminary view. Accordingly, the Commissioner confirmed the decision of the agency to refuse access to the requested documents under section 26 of the FOI Act, on the basis that the requested documents either cannot be found or do not exist.