

Participants:

Alison Rose Georgeson
Complainant

- and -

**Government Employees
Superannuation Board**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to a superannuation account – scope of access application – request for personal information – application fee required for non-personal information – definition of ‘personal information’ and ‘non-personal information’ – personal information about individuals other than the access applicant – meaning of ‘third party’ – whether names, positions and functions of officers of an agency are personal information – time frame of documents encompassed within application – whether agency required to deal with documents that are not in existence at the date of the access application but which come into existence thereafter – right of access limited to documents in possession of agency on day application received – section 26 – documents that do not exist or cannot be found – the searches made by the agency – whether all reasonable steps taken to locate documents

Freedom of Information Act 1992: sections 10, 12(1), 16(1)(d), 26, 32, 33, 63(2)(d) and 63(2)(f); Schedule 1, clauses 3(1) and 3(3); Glossary, clauses 1 and 4

Freedom of Information Regulations 1993: regulations 2A and 4

Freedom of Information Act 1982 (Cth)

Superannuation (Resolution of Complaints) Act 1993 (Cth): section 38(3)

Lobo and Department of Immigration and Citizenship [2010] AATA 583

Radar Investments Pty Ltd and Health Insurance Commission [2004] AATA 166 *Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* (1985) 8 ALD 163

Re Boland and the City of Melville [1996] WAICmr 53

Re Brown and Police Force of Western Australia [1995] WAICmr 22

Re Edelsten and Australian Federal Police (1985) 4 AAR 220

Re Leighton and Shire of Kalamunda [2008] WAICmr 52

Re Murtagh and Federal Commissioner of Taxation (1984) 54 ALR 313

Re Musulin and Potato Market Corporation of Western Australia and Others [2001] WAICmr 26

DECISION

The agency's decision is confirmed. I find that the agency's decision to refuse access to the requested documents under s.26 of the FOI Act is justified.

Sven Bluemmel
INFORMATION COMMISSIONER

18 April 2013

REASONS FOR DECISION

1. This complaint arises from a decision made by the Government Employees Superannuation Board ('the agency') to refuse Ms Alison Georgeson ('the complainant') access to documents under s.26 of the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In early 2008, the complainant had a dispute with the agency in relation to a withdrawal of funds from the complainant's Retirement Access Account held by the agency. The complainant subsequently lodged a complaint with the Superannuation Complaints Tribunal ('SCT') in or around late May to early June 2009. I understand that matter was finalised by the SCT in June 2012.

3. On 30 September 2011, the complainant applied to the agency under the FOI Act for access to certain documents ('the requested documents') as follows:

"I wish to apply for access to the following information:

- *all paper and electronic documents (excluding account statements) that relate or refer to my **Retirement Access Account** [the complainant's emphasis] for the period from 1 January 2008 until the present;*
- *copies of all correspondence held by GESB that relate to the Retirement Access account in my name.*

I understand that as my request is limited to personal information regarding me and an account in my name, that no application fee is payable for accessing this information.

Please note that as some of the items on GESB's records might relate to dealings by [a named third party] and I have therefore included his authority below to release that information."

4. By letter dated 14 October 2011, the agency confirmed that it had received the complainant's access application on 6 October 2011 and that no fee was payable for the release of personal information.
5. By notice of decision dated 15 November 2011, the agency gave the complainant access to 36 documents, some in full and some in edited form, with advice that "[s]ome of the information enclosed in the attached schedule has had third party information removed (such as name and job titles of officers involved in the processing of transactions on your accounts)."
6. On 14 December 2011, the complainant sought internal review of the agency's decision, claiming that further documents existed in relation to the documents requested in her access application and the complainant provided further particulars. The complainant did not raise any issues with respect to the 36 documents released to her. On internal review, the agency identified and gave the complainant access to four additional documents and advised that it had located no further documents.

7. By letter dated 5 February 2012, the complainant applied to my office for external review of the agency's decision to refuse her access to further documents which fall within the scope of her access application. In that letter, the complainant referred to seven letters and 44 attachments, as well as correspondence between the agency and the SCT, which she claimed were in the agency's possession but had not been disclosed.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following my receipt of the complainant's application for external review, the agency produced to me the complete original FOI file maintained in respect of the access application. Having reviewed that material, my office made a number of inquiries with the complainant and the agency.
9. My officers asked the agency for details of the searches and inquiries undertaken in locating documents the subject of the complainant's access application. In addition, further information was sought from the agency regarding its understanding of the scope of the complainant's access application and its electronic and manual record-keeping systems.
10. In response, the agency outlined the locations it had searched for the requested documents; how those searches were conducted; by whom; and why those locations were chosen to be searched. During the course of those inquiries, the agency reconsidered its interpretation of the scope of the complainant's application and, on 25 October 2012, the agency identified a further 31 documents (which included the seven letters and 44 attachments referred to in the complainant's application for external review). As a result, on 26 November 2012, the agency gave the complainant access to the 31 documents, in full and edited form, with the names of third parties (that is, people other than the complainant) deleted.
11. In light of the further disclosure by the agency, my officer advised the complainant that it appeared that the agency had now taken all reasonable steps to locate the requested documents but that no further documents existed.
12. By letters dated 18 November 2012 and 9 December 2012, the complainant did not accept the reasons provided by the agency for its failure to identify the 31 documents in dealing with her access application. The complainant advised my office that she was aware of additional documents that existed that had still not been located by the agency and made submissions in support of her claim. The complainant also queried the deletion of names and other identifying details about other people from the 31 additional documents and disagreed with the agency's interpretation of the timeframe of her access application.
13. On 16 January 2013, after considering the material then before me, including the complainant's and the agency's submissions, I informed the parties, in writing, of my preliminary view of the complaint and my reasons. It was my preliminary view that the agency's decision to refuse access to the requested documents under s.26 of the FOI Act was justified and I did not require the agency to conduct any further searches at that time. I also considered that documents created after the date the access application was received by the agency were outside the scope of the access application.

14. In light of my preliminary view, I invited the complainant to withdraw her complaint or provide me with further submissions relevant to the matters for my determination. The complainant did not withdraw her complaint but made additional submissions.

NON-PAYMENT OF APPLICATION FEE – APPLICATION FOR PERSONAL INFORMATION

15. With respect to the 31 additional documents disclosed to the complainant during this external review, the complainant queried the deletion of certain details about individuals from those documents, including from correspondence sent between her and the agency. In particular, the complainant stated:

- “1. *In a number of cases the names and identifying details of persons have been deleted from the documents supplied. The justification for this action seems to be that I did not pay any fee to access the documents, on the basis that I was seeking documents that related to me personally. Can you please confirm that the deletion of names from those documents is based solely on the fact I did not pay (nor was I offered the opportunity) to access those documents?*
2. *The deletion of names from the documents seems to include persons I would refer to as first and second parties, rather than just third parties. For instance, in some communication where either I am the addresser or the addressee, the names of either the addressee or the addresser have been deleted. I contend those names should not have been deleted, as those names are not referring to third parties. Can you please clarify whether GESB has a right under the FOI Act to delete the names of first or second persons?*”

16. The primary issue before me appears to concern the question of whether the agency was justified in deleting information about other people, on the basis that the complainant’s application was for personal information. I note that an access application is not valid unless it complies with s.12(1) of the FOI Act, which includes the payment of any application fee payable under the *Freedom of Information Regulations 1993* (‘the Regulations’). Regulation 4 and Schedule 1 of the Regulations together provide that a fee of \$30 is payable for an application for non-personal information. However, no application fee or charges are payable for giving an applicant access to “*personal information about the applicant*”: see s.16(1)(d) of the FOI Act and regulation 4 of the Regulations.

17. The term ‘personal information’ is defined in the Glossary to the FOI Act to mean:

“...*information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*

- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample”.*

18. In regulation 2A of the Regulations, ‘non-personal information’ is defined to mean *“information that is not personal information about the applicant.”*
19. There is no express discretion under the FOI Act for an agency to waive the \$30 application fee payable for non-personal information. If an applicant does not pay the \$30 application fee, the application is a valid application for access to personal information, as defined in the FOI Act, about the applicant only. In that case, it follows that any information in the requested documents about people other than the applicant (in this case, the complainant) is outside the scope of the application and, therefore, need not be disclosed.
20. Having reviewed the agency’s FOI file and the complainant’s access application, I consider that the complainant applied for personal information in relation to herself only. The complainant did not pay the \$30.00 application fee payable under the FOI Act for applications which are not limited to personal information about herself and clearly stated in her application that *“I understand that as my request is limited to personal information regarding me and an account in my name, that no application fee is payable for accessing this information.”* In all correspondence, I understand that the agency proceeded to deal with the complainant’s application accordingly.
21. Further, the agency’s initial decision-maker advised the complainant in its letter dated 15 November 2011 as follows:

“Some of the information enclosed in the attached schedule has had third party information removed (such as name and job titles of officers involved in the processing of transactions on your accounts).”
22. At no stage did the complainant query that decision on internal review. As there is no evidence before me of the complainant contesting that advice, I consider that the agency was entitled to deal with her application as an application for personal information about her only. Therefore, any information which is personal information about other people (non-personal information) is outside the scope of the complainant’s application and the agency was entitled to delete that information. This is regardless of whether that information is contained in the complainant’s own documents previously sent to the agency or in letters from the agency to her. The complainant refers to ‘first and second parties’ however, I note that the FOI Act defines a ‘third party’ to mean any individual other than the applicant: see Glossary to the FOI Act and sections 32 and 33 of the FOI Act.
23. In her latest submissions to me, the complainant contended that the agency had deleted information from those documents that was not personal information about other people, namely that the agency had deleted the names, positions and functions of its officers from those documents. The complainant argued that the names, positions, functions and actions of the agency’s officers were not ‘personal information’ about other people because of the operation of clause 3(3) of Schedule 1 to the FOI Act. The complainant claimed that clause 3(3) applied regardless of whether she had paid a fee to access that information and, therefore, identifying details about officers should have been included.

24. With respect to that argument, I consider the complainant's understanding of the meaning of 'personal information', as defined in the FOI Act, and her understanding of the operation of clause 3(3), is misconceived. As set out in paragraph 17 of this decision, the definition of 'personal information' in the Glossary includes any information or opinion about an identifiable individual. This includes information or opinion about members of the public as well as officers of agencies and no distinction is made between any classes of individuals in the definition of 'personal information'. Therefore, the names, positions and functions of officers of an agency – as referred to in clause 3(3) – are all still 'personal information' as defined in the FOI Act. As noted earlier, 'non-personal information' is defined to mean information that is not personal information about the applicant.
25. However, as the complainant in this case did not pay the application fee for non-personal information, all of that information is outside the scope of the access application. This means that any personal information about other people (whether members of the public or officers of an agency) is outside the scope of the complainant's application. The corollary to that is that the provisions of the FOI Act do not apply to that information since it was not sought in the access application under the Act. Therefore, the exemption provision in clause 3 of Schedule 1 to the FOI Act does not come into operation with respect to information that is outside the scope of the application. Specifically, the provision in clause 3(3) becomes relevant only where that information has been sought – and an application fee paid for that information – under the FOI Act. Clause 3(3) of Schedule 1 to the FOI Act provides that certain personal information about officers of an agency – known as prescribed details – are not exempt under clause 3(1).
26. Therefore, having examined the information that the agency deleted from the 31 documents as being outside the scope of her application, I agree that all of that information is outside the scope of the complainant's application, as it is information about other people (non-personal information), and the agency was entitled to delete it.
27. In any event, I consider that even if the complainant had made an application which was not limited to personal information about her, and paid the \$30 application fee, it does not necessarily follow that personal information about other people would be automatically disclosed. Under clause 3(1) of Schedule 1 to the FOI Act, personal information is *prima facie* exempt from disclosure, unless it can be established that one of the limits on the exemption set out in clauses 3(2)-3(6) applies. It is in these circumstances that the operation of clause 3(3) may have been applicable to some of the matter deleted from the 31 additional documents. Further, the FOI Act imposes the obligation on agencies to consult with *all* third parties – including officers of agencies – referred to in the relevant documents, if access is proposed to be given: see s.32 of the FOI Act. This can often impose significant difficulties and lengthen the time to process an application, where there are numerous third parties.
28. By way of comment, I note that the agency in this matter has exercised its discretion and disclosed to the complainant more than it was required to under the FOI Act. The additional documents disclosed included a large amount of personal information, as that term is defined in the FOI Act, by which third parties could be identified, including some of the names and positions of its officers in some of those documents.

TIME FRAME OF THE COMPLAINANT'S ACCESS APPLICATION

29. During this external review, the parties disputed the time frame of the documents sought in the complainant's access application. In particular, the question raised related to the precise 'cut-off date' for determining which documents were covered by the terms of the complainant's access application, which is framed in terms of seeking access to "*all documents*" and "*to the present date*".
30. In dealing with the access application, the agency dealt with those documents in existence at the date the application was received by the agency, that is, 6 October 2011. The complainant contended that the agency should have included documents created after that date, since the agency was aware of, and held, a significant number of documents which were created after 6 October 2011 as a result of the review before the SCT. The complainant also referred to the considerable amount of time that had passed since lodgement of her access application with the agency to my office dealing with the matter.
31. In my preliminary view letter to the parties dated 16 January 2013, I considered it appropriate for the agency to have interpreted the timeframe of the complainant's access application to be taken as up to the date on which the application was received by the agency, being 6 October 2011.
32. In response to my preliminary view, the complainant acknowledged that it would be onerous for an agency to deal with an open-ended request. However, the complainant advised that on 12 December 2012, the agency had since, without prompting, sent her a further package of documents dated from 23 November 2012 through to 7 December 2012 and therefore, the agency did not hold the same view that the time frame of her access application was for documents up to 6 October 2011.
33. The complainant further suggested that 14 June 2012 was an appropriate cut-off date for her request for documents in this matter since the SCT's determination of her dispute with the agency was handed down on that date. In addition, the complainant maintained that no additional burden would be placed on, or searches required of, the agency as the further documents sought would be on the same paper-based filing system as the documents previously located.
34. The issue before me concerns whether the agency is required to respond to an access application solely with respect to documents existing and held by the agency at the date of the request or some other date. Ancillary to that issue is the question of whether the right of access under the FOI Act applies to documents that are not in existence at the date of the access application but which come into existence thereafter.
35. In my view, it is clear from the provisions of the FOI Act that an access application only applies to existing documents and not to documents that may come into existence at some time in the future. Under the FOI Act, the right of access to documents is created by section 10 of the Act and is a right of access to "*documents of an agency (other than an exempt agency)*" subject to and in accordance with the provisions of the FOI Act. A "*document of an agency*" means "*a document in the possession or under the control of the agency*": see clause 4 of the Glossary to the FOI Act. To exercise that right to obtain access to documents, a person must make a request in accordance with s.12 of the FOI Act. In my view, these provisions, together with the procedural

steps that an agency must follow in dealing with an access application, as set out in Parts 2 and 3 of the FOI Act, are framed in terms of documents that are in existence at the time the request is made rather than at some later stage.

36. Although an access application does not apply to all future relevant documents, past decisions of this office have considered that it may apply to documents of an agency which come into existence after the date of the access application, but before the date of the agency's decision: see *Re Brown and Police Force of Western Australia* [1995] WAICmr 22 at [13]-[18] and *Re Musulin and Potato Market Corporation of Western Australia and Others* [2001] WAICmr 26 at [19]-[21] which took guidance from the decisions of the Commonwealth Administrative Appeals Tribunal ('the AAT') in *Re Murtagh and Federal Commissioner of Taxation* (1984) 54 ALR 313 and *Re Edelsten and Australian Federal Police* (1985) 4 AAR 220.
37. In *Re Edelsten*, at paragraph 17, the AAT rejected a submission by the applicant that an agency is required to provide, where an applicant has so requested, all future documents relating to the request. The Tribunal outlined the relevant sections of the *Freedom of Information Act 1982* (Commonwealth) ('the Cth FOI Act') and then said:

"It seems to us that these sections are expressed in terms of a document that is in existence at the time of the making of a request or a decision. They do not appear to give a person a right to obtain, or to impose upon an agency or Minister a correlative duty to provide, access to all future documents which satisfy the terms of the request".
38. However, it is noted in the above decisions of my predecessors that whether or not an agency responds to an access application solely with respect to documents existing and held by the agency at the date of the request, or at the date of the decision or some date shortly before the decision, will depend on the circumstances of the particular application.
39. While I acknowledge that considerable time has passed since the complainant lodged her application with the agency, the circumstances of the present case are distinguishable from *Re Musulin* and *Re Brown*. Those cases concerned only two to three documents that came into existence a short time after the access application was lodged and hence it was considered reasonable to take those documents into account. In the present case, I understand the complainant wishes the agency to give her access to "*all the documents [the agency] has on its paper based filing system it uses for complaints to the Superannuation Complaints Tribunal*" from 6 October 2011 until 14 June 2012. However, this would require the agency not only to retrieve those documents, but time would be required to examine and delete personal information about third parties and to assess whether some of those documents contain information that may be outside the scope of her application or exempt under any other exemption clauses in Schedule 1 to the FOI Act. Additional time would also be required to photocopy the documents and prepare a notice of decision. I do not accept the complainant's submission that it would not be an onerous burden on the agency.
40. In any event, more recent decisions of the AAT have reconsidered its view and determined that a request made under the Cth FOI Act is limited to documents in the possession of the agency on the day the request is received: see *Radar Investments Pty Ltd and Health Insurance Commission* [2004] AATA 166 and *Lobo and Department of*

Immigration and Citizenship [2010] AATA 583. In reaching that view, the AAT had regard to the procedural steps set out in the Cth FOI Act for dealing with an application and considered that those provisions did not support the proposition that a request should be read as capturing all future documents while a decision (as to access to those documents) remained pending. The AAT noted that the focus of the provisions in the Cth FOI Act “*is upon the documents that meet the request when that request is made rather than at a later stage, including the decision stage*”: *Lobo* at [56]; see also *Radar* at [39]-[40].

41. In its review, the AAT in *Lobo* further considered that the provisions of the Cth FOI Act did not contemplate that there would be a search conducted at each stage of the process of internal review and final review by the AAT for documents that have come into the agency’s possession since the previous stage. I consider the decisions in *Lobo* and *Radar* to be relevant and persuasive and I do not consider the positions in *Re Musulin* and *Re Brown* should be followed in the circumstances of the present case.
42. In this instance, the access application was clearly marked by a date-stamp as having been received by the agency on 6 October 2011. The agency proceeded to deal with documents up until that date. In response to my officer’s request for information, the agency advised on 25 October 2012 that “[t]he FOI application was specific in the date range of information requested – being 1 January 2008 to 6 October 2011 (this is the date GESB received the FOI request).”
43. Having regard to the provisions of the FOI Act and the circumstances of this case, in my view the agency is not required to provide future documents relating to the application. I have reviewed the terms of the complainant’s application and, in my opinion, the agency was required to consider her request only in relation to documents that were in existence at the time it received the request on 6 October 2011 (the cut-off date in this case).
44. The complainant has contended that the agency no longer holds the view that 6 October 2011 is the cut-off date due to its action of releasing further documents to her that were created after that date. I do not agree with that contention. With respect to that further disclosure, the agency advised my office that the additional package of documents dated from 23 November 2012 through to 7 December 2012 was provided to the complainant outside of the FOI Act. I understand that the agency chose to exercise its discretion to give the complainant further documents that came into existence after the cut-off date. Although an agency could choose to give access to further documents that subsequently came into existence after the date that it received the application, an agency cannot, however, be compelled to do so.
45. For the reasons given above, I consider it was appropriate for the agency to have proceeded on the basis that the scope of the complainant’s access application was for documents in existence on the date the application was received on 6 October 2011. The agency is not obliged to supply future documents coming into existence after that date.
46. By way of comment, I note that in some instances, parties have reached an agreement with an agency for it to consider documents that have come into existence a short time after the date of the request. I consider this to be a practical approach and there is certainly nothing in the FOI Act that prevents parties from negotiating such an

agreement. Such an approach can provide the opportunity for issues to be resolved in the first instance and can minimise the need for successive applications. As I understand it, in any event, the complainant has since made a new access application to the agency for additional documents dated after 6 October 2011.

THE REQUESTED DOCUMENTS

47. The requested documents are the documents sought in the complainant's access application of 30 September 2011, received by the agency on 6 October 2011, as set out in paragraph 3 of this decision.

SECTION 26 – DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

48. The complainant claims that not all the requested documents were identified by the agency and that additional documents exist. In its internal review decision, the agency advised the complainant that it could not locate any further documents. In effect, the agency's decision was to refuse the complainant access to any further requested documents under s.26 of the FOI Act on the ground that, having taken all reasonable steps to locate those documents, it was not possible to give access to them because those documents either cannot not be found or do not exist.

49. Section 26(1) of the FOI Act deals with an agency's obligations when it is unable to locate documents sought by an access applicant or when those documents do not exist. Section 26 states:

“(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.”

50. When dealing with an agency's decision to refuse access to documents pursuant to s.26, the questions to be asked are whether there are reasonable grounds to believe that the requested documents exist or should exist and 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 the documents.
51. The adequacy of an agency's efforts to locate documents are 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 and also *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [85].

52. I do not consider that it is generally my function or that of my staff physically to search for documents on behalf of a complainant. Provided I am satisfied that the requested documents exist or should exist, I take the view that my responsibility is to inquire into whether the agency has taken all reasonable steps to find the documents and, if necessary, to require the agency to conduct further searches.

The complainant's submissions

53. The complainant's submissions are set out in her application to me seeking external review dated 5 February 2012 and her further letters to this office dated 15 August 2012, 18 November 2012, 9 December 2012, 29 January 2013 and 4 February 2013. In summary, the complainant submits as follows:

- The agency still holds a number of documents that it has not released. The complainant is confident that the agency has not produced all of the documents in its possession that fall within the scope of the complainant's application because she already has copies of some of those documents, which she received from the SCT.
- Further, a matter relating to the complainant and the agency has been with the SCT for some 31 months which supports the likelihood that more documents exist. For example, since the time the complainant lodged her application for external review dated 5 February 2012, the agency has created several additional documents that it has produced to the SCT. The complainant believes that the agency should also provide those documents to her as part of this complaint.
- As far as the complainant is aware, correspondence from the agency to the SCT is not subject to any type of privilege that would prevent its disclosure or give the agency a reason to consider those documents as exempt. Further, the SCT encourages an open sharing of information to help the parties reach conciliation.
- While the complainant acknowledges that she already has copies of many of the documents she requested in her access application, the complainant received those documents as part of a review by the SCT. The SCT made those documents available subject to the provisions of the *Superannuation (Resolution of Complaints) Act 1993* (Cth), in which s.38(3) prohibits the use of those documents for any other purpose other than for a review by the SCT. For that reason, the complainant has sought those documents under the FOI Act. This includes copies of the complainant's own correspondence.
- The complainant confirms that she has received 31 additional documents during the course of this external review. However, she does not accept the agency's explanation for failing to identify those documents when initially dealing with her application. The explanation now provided by the agency for its failure to produce the 31 additional documents was the same explanation used by the agency some 46 weeks earlier, when further information was located from the same file as part of internal review.
- The complainant does not accept my preliminary view that there was a genuine misunderstanding by the agency as to its obligations under the FOI Act. The

complainant submits that there is no evidence for me to form that view and that I have given the agency undue benefit of the doubt by attributing its actions to the confusion of its officers.

- The complainant believes the agency actively refused her access to documents. There is evidence that agency officers were intimately aware of the existence of the 31 additional documents and the paper-based file that related to her complaint and the SCT as early as 5 January 2012, when further information was located from that file as part of internal review. The complainant quoted from a number of letters and emails sent by the agency in that regard.
- The complainant claims that the same officers of the agency who dealt with her complaint to the SCT, also dealt with her FOI request. Those officers had written to the SCT at the beginning of 2012 seeking the SCT's advice on whether the FOI Act applied to those documents. The complainant referred to an email dated 14 February 2012 sent by the agency to the SCT in support. The complainant further provided me with a copy of a letter dated 18 January 2012 sent from the agency to the SCT and submitted that this letter was one of many that was "*proof that [the agency's] officers actively and knowingly refused to: 1. Release all documents to me as required by the FOI Act; or 2. State under what section of the FOI Act, the agency considered those documents to be exempt.*"
- The SCT is a Commonwealth Government body which is also subject to freedom of information legislation.

The inquiries and searches conducted by the agency

54. In correspondence to this office dated 4 September, 25 October, 26 November 2012 and 12 February 2013, the agency answered questions and provided me with information about its records system; details of the searches and inquiries made to locate the requested documents; and the additional searches now conducted during the course of this external review. I have summarised the agency's advice and the searches made in this matter as follows:

- All member account related information and correspondence are stored by the agency using an Electronic Imaging Workflow ('EIW') program in which documents are imaged and stored in the member's individual EIW electronic file. The types of correspondence stored in members' EIW files include Benefit Payment Request forms, investment choice forms, emails, faxes and letters from members. Copies of letters the agency sends to members are also stored in each member's individual EIW file.
- Original documents received from members are scanned and imaged to the member's EIW file. The original documents are archived and held in an off-site storage area before being destroyed. Currently member correspondence that is received is kept for a period of six months and then destroyed. Electronic copies are kept during the life of the membership.
- A search of the electronic folder for the member – the complainant's EIW file – was conducted by looking in the member index which provides a brief description

of each of the documents. Searches were conducted by the FOI Officer. A second search was conducted by one other officer to check the initial search. Two searches were conducted at the time of receiving the FOI request with another two searches conducted at the time the internal review request was received.

- All telephone calls dialled into and out of the agency's Member Services Centre are recorded and stored electronically using a telephone call recording programme. Searches of the telephone recording programme were conducted by an officer in the agency's Member Services Centre.
- Correspondence sent to the SCT is not stored in a member's EIW file. A paper-based file is maintained to store all correspondence relating to SCT matters and electronic copies of the letters are stored in a restricted network directory. Access to this directory is only provided to those employees who deal with SCT matters.
- The agency advised that documents in the paper-based SCT file and electronic network directory that relate to the complainant's Retirement Access account were not included in the agency's response to her access application. This was because responses to the SCT are not stored in EIW. The agency also initially explained that the complainant's "*FOI request outlined [her] understanding that the request was limited to personal information – the responses provided to the SCT were [the agency's] responses in relation to [her] complaint and were not addressed to [her].*" However, following a series of communications with my office, the agency was prepared to reconsider its interpretation of the scope of the complainant's access application.
- Accordingly, further searches were conducted by the agency during the course of this external review and additional documents that fall within the scope of the requested documents were located from the paper-based SCT file and electronic network directory relating to the complainant. The agency acknowledged that copies of these documents should have been provided to the complainant as part of dealing with the access application.
- As a result, the agency sent the complainant copies of 31 additional documents by letter dated 26 November 2012, which included the seven letters and 44 attachments referred to in the complainant's application for external review.
- Although the access application was specific in its date range – being 1 January 2008 to 6 October 2011 (the date the agency received the application) – the agency noted that the complainant was provided with copies of letters sent from the agency to the SCT after the specified period as part of the SCT Review Meeting process. The agency noted that the SCT exchanges all information received from each party prior to a Review Meeting. A Review Meeting is held when a complaint cannot be resolved by inquiry and/or conciliation and has not been withdrawn by the SCT. A Review Meeting determines the outcome of the complaint. A Review Meeting in relation to the complainant's complaint was held on 7 May 2012 and the matter finalised in June 2012.

- The agency advised that it approached the FOI request by furnishing the complainant with copies of correspondence that was issued in response to her letters and emails to the agency in relation to her Retirement Access account. The agency did not supply copies of the complainant's own letters to the agency as it was of the view that the complainant would have retained copies for her own records. However, the agency acknowledged that they fall within the scope of the requested documents and the complainant has now been provided with her own letters sent to the agency in the 31 additional documents sent to her.
- The agency confirms that over a four-year period, a number of different officers dealt with the complaint before the SCT and that some of those same officers were also involved in dealing with the complainant's access application. However, the agency has never denied the existence of a paper-based SCT file from which the 31 additional documents were disclosed. As noted, those documents were not previously disclosed because they were considered to be either copies of correspondence sent from the agency to the complainant or were considered to be outside the scope of the request.
- The letter dated 18 January 2012, as referred to by the complainant, was a letter sent by the agency to the SCT to advise that an access application had been received from the complainant and dealt with. No advice was sought on whether the FOI Act applied and no detail was provided to the SCT about the nature of the FOI request.
- The email dated 14 February 2012 from the agency to the SCT was in response to a request from the SCT to ascertain if the agency had any objections to the disclosure of certain documents if the matter proceeded to the Review Stage of the SCT's proceedings. In the email of 14 February 2012, the agency also advised the SCT that the complainant had lodged a complaint with the Information Commissioner and requested advice on whether this would impact the progress of the SCT complaint.

Consideration

55. I have considered all of the information before me, including the information on the agency's FOI file; the agency's notices of decision; the documents that the agency has released to the complainant; the information the agency has provided to my office; and the complainant's submissions. I have also considered the searches and inquiries the agency has conducted to date.
56. On receipt of the complainant's complaint, it appeared on its face that it was reasonable to expect further documents of the type the complainant requested might exist and might be held by the agency. The documents requested by the complainant relate to her Retirement Access account held by the agency. I further understand that, at the time of her application, there was an ongoing complaint before the SCT regarding the agency's actions in relation to the complainant's Retirement Access account. The complainant also provided details in support of her claim of the existence of further documents.
57. However, in light of the inquiries made by my office and the searches now conducted, there is no evidence before me that any further documents exist in the possession or

control of the agency other than those that have now been identified and provided to the complainant. As outlined above, the agency has now undertaken a number of searches in order to locate the requested documents. This included searches of electronic and paper-based files.

58. From the material before me, it appears that the agency initially took a narrow view of the scope of the complainant's access application. However, after its reconsideration, the agency located and gave the complainant access to additional documents, including copies of the complainant's own correspondence and the seven letters and 44 attachments referred to in her application for external review.
59. Based on my inquiries, I understand that the additional documents were not located when the agency initially dealt with the complainant's access application because it had largely misconstrued the scope of her request, particularly in relation to her own correspondence and correspondence sent to the SCT. The agency has since acknowledged that those documents should have been disclosed as part of the complainant's application.
60. Notwithstanding the agency's explanation and acknowledgement, the complainant maintains that the agency actively refused her access to documents whilst fully aware of their existence. The complainant submits that there is evidence that the agency was aware of its obligations under the FOI Act and that I had given undue weight to the agency's misunderstanding of the Act. The complainant has referred me to correspondence sent by the agency in that regard.
61. I have reviewed the correspondence referred to by the complainant and examined the documents provided. However, from my review of those communications, they appear to be generally advising of certain actions taken by the agency. For instance, the letter dated 18 January 2012 sent by the agency to the SCT simply advised the SCT that it had received an access application from the complainant and that it had been dealt with under the provisions of the FOI Act. I note that letter was sent after the agency had completed its internal review decision. The letter does not seek advice from the SCT as to the application of the FOI Act, as the complainant claims.
62. While I accept that the agency's internal review decision dated 5 January 2012 indicates the existence of a separate file relating to the complainant's Retirement Access account, there is nothing on the material before me that suggests that the agency intentionally withheld documents from that file or there was anything untoward in the agency's management of the matter.
63. From my inquiries with the agency, it was apparent from the response it provided that there was some lack of understanding by the agency as to the application of the FOI Act in conjunction with a separate legal process that was occurring concurrently before the SCT at the time. As advised by the agency, particularly in relation to its email to the SCT dated 14 February 2012, the agency had concerns with respect to the impact, if any, of the complainant's access application on the progress of ongoing proceedings before the SCT. In this case, the agency has since acknowledged that the additional documents located and given to the complainant during this external review should have been identified in dealing with the application. Nonetheless, I do not consider that incompetence or ignorance of the obligations imposed by the FOI Act on agencies provides a refuge or an excuse for the failings of an agency in complying with the Act.

64. I note that part of my function under the FOI Act is to ensure that agencies are aware of their responsibilities under the FOI Act and to provide assistance to them on matters relevant to the Act: see ss.63(2)(d) and (f) of the FOI Act. In that regard, I have clarified for the agency the application of the FOI Act to documents that may or may not have been released through a separate process outside the FOI Act. I have also drawn the agency's attention to its potential shortcomings in misinterpreting the terms of an access application. In the circumstances, I am satisfied that the agency has recognised the problems identified by this external review and is conscious of its obligations in locating documents during searches conducted under the FOI Act in future.
65. Having regard to all of the searches and inquiries now made, I consider that, at this stage, the agency has taken all reasonable steps to find the requested documents but those documents either cannot be found or do not exist. Section 26 of the FOI Act requires an agency to take not 'all steps' but rather all "*reasonable steps*" to find documents: see *Re Boland and the City of Melville* [1996] WAICmr 53 at [27].
66. With respect to documents created after 6 October 2011, as discussed earlier in paragraphs 29-46 of this decision, I do not consider that they fall within the scope of the requested documents. Further, as noted in her submissions, it is also open to the complainant to lodge an access application to the SCT under the equivalent Commonwealth legislation.
67. I do not consider that there are any grounds for requiring the agency to conduct further searches for the requested documents.

CONCLUSION

68. I find that the agency's decision to refuse access to the requested documents under s.26 of the FOI Act is justified.
