

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

**File Ref: F2012355  
Decision Ref: D0242013**

Participants:

**Shannon Gregory O'Rourke**  
Complainant

- and -

**Town of Claremont**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – deferral of access – section 25 – documents relating to the heritage assessment of a property – refusal of access – 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 3, 3(2), 3(3), 4, 10, 25(1)(b), 26 and 30(f)

*Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* [1985] AATA 201 (1985) 8 ALD 163

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

*Re Leighton and Shire of Kalamunda* [2008] WAICmr 52

*Salaries and Allowances Tribunal v West Australian Newspapers Ltd* (2008) 36 WAR 324

## DECISION

The agency's decision is varied. I find that:

- the agency's decision to defer the giving of access to Document 1 under s.25(1)(b) is not justified; and
- the agency's decision made under s.26 of the FOI Act is justified. The agency has taken all reasonable steps to locate the requested documents and those documents either cannot be found or do not exist.

SVEN BLUEMMEL  
INFORMATION COMMISSIONER

10 October 2013

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Town of Claremont (**the agency**) to defer the giving of access to a document to Mr O'Rourke (**the complainant**) under s.25 of the *Freedom of Information Act 1992* (**the FOI Act**) and to refuse access to certain documents under s.26 of the FOI Act.

## BACKGROUND

2. The agency advised me that it has a Municipal Inventory (**the MI**), which is a list of heritage places within the boundaries of the agency. The complainant's property is listed on the current MI. The current MI was adopted by the Council of the agency in the early 1990s. Every four years, the agency reviews the MI.
3. In addition, the agency advised me that to assist in the review of its MI, the agency engaged a Heritage Architect to work in conjunction with the agency's Heritage Officer. The agency advised me that it expected that the Council of the agency would endorse the MI for advertising at its Ordinary Council Meeting on 18 December 2012. The draft of the MI will then be available to the public and following the consultation period, the Council will adopt the MI with or without amendment after considering community feedback. Once adopted, the MI will be published in its final form.
4. In an access application dated 4 September 2012, the complainant applied to the agency under the FOI Act for access to documents dated after 1 January 2007 relating to the cultural heritage assessment of his property.
5. In a notice of decision dated 28 September 2012, the agency's Governance Officer confirmed that the agency had identified one document (**Document 1**) as coming within the scope of the complainant's access application and decided under s.25(1)(b) of the FOI Act to defer giving access to Document 1 until after it had been '*...presented to Council at the Ordinary Council Meeting on 18 December 2012.*'
6. On 4 October 2012, the complainant applied for internal review of that decision, on the basis that he did not consider the agency had taken all reasonable steps to locate all of the documents potentially coming within the scope of his access application.
7. On internal review, the agency identified three additional documents as coming within the scope of the complainant's access application. The agency also decided that:

*...other information detailed in [the complainant's] request for subject matter on the document deferred from disclosure cannot be provided as it does not exist...had it existed, this information would have also been subject to deferred disclosure under Section 25(1)(b) of [the FOI Act].*

8. On 2 November 2012, the complainant applied to the Information Commissioner for external review of the agency's decision. In his application for external review, he stated that:

*The town has not taken all reasonable steps to locate documents that fall within the scope of the request.*

*Previous correspondence with the town suggests the town has drafts, file notes, recommendations that are not identified and not subject to s.25(1)(b) of the Act.*

9. On that basis, I proceeded to deal with this complaint as a complaint to me limited to the agency's decision to refuse the complainant access to documents under s.26 of the FOI Act.
10. However, in an email dated 27 March 2013 to my office, the complainant confirmed that he also sought external review of the agency's decision to defer giving him access under s.25(1)(b) of the FOI Act to Document 1.
11. There are two aspects to this complaint; firstly, the complainant seeks external review of the agency's decision to defer giving him access to Document 1 under s.25(1)(b) of the FOI Act; and secondly, to in effect refuse him access to documents under s.26 of the FOI Act on the basis that further documents cannot be found or do not exist.

## **REVIEW BY THE INFORMATION COMMISSIONER**

12. Following the receipt of this complaint, I required the agency to produce to me the originals of the documents in dispute, together with the original of the agency's FOI file maintained in respect of the access application for examination. On 17 July 2013, I provided the parties with a letter setting out my preliminary view of this complaint. My preliminary view, on the information before me at that time, was that the decision of the agency to defer giving access to Document 1 under s.25(1)(b) of the FOI Act was not justified. It was also my preliminary view that the agency had conducted reasonable searches and no further documents exist or could be found.
13. The agency maintained its decision under s.25(1)(b) and made further submissions to me to support its position. The complainant accepted my preliminary view in relation to the decision under s.25(1)(b) but did not accept my preliminary view with respect to the agency's decision under s.26 of the FOI Act. The complainant also provided me with further submissions to support his position.

## **Form of notices of decision**

14. Section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. In the present case, it was up to the agency to demonstrate that

it had established the requirements of s.26 by showing that it had taken all reasonable steps to find the requested documents.

15. If an agency decides to refuse access to a document, s.30(f) of the FOI Act provides that the agency must include the following details in its notice of decision:
  - the reasons for the refusal;
  - the findings on any material questions of fact underlying those reasons; and
  - reference or references to the material on which those findings are based.
16. The agency's notices of decision did not identify the hardcopy files from which relevant documents were located and they did not contain the findings on the material questions of fact underlying the decision to refuse access. Neither notice referred to the material on which the agency's findings were based, as required by s.30(f) of the FOI Act. It is not sufficient compliance with s.30 of the FOI Act solely to state, as here, that the requested documents cannot be provided because they do not exist, without detailed information as to the searches and inquiries made. A notice of decision should include, for example, details of the specific files from which documents were located, identifying the specific locations searched; the searches or inquiries conducted (manual or electronic); or the keywords used to conduct electronic searches.
17. The obligation to provide applicants with notices of decision that contain all of the information prescribed by s.30 is intended to ensure that the true basis of a decision is clearly explained to the applicant. An applicant is entitled to reasons for the agency's decision. The agency's obligations are clearly set out in s.30(f).

## **THE DISPUTED DOCUMENT**

18. The agency has decided to defer the giving of access to Document 1 under s.25(1)(b) of the FOI Act.

## **SECTION 25 – DEFERRING OF ACCESS**

19. Section 25 provides that:

*“(1) The agency may defer giving access to a document for a reasonable period if the document -*

*(a) is required by law to be published but is yet to be published; or*

*(b) has been prepared for presentation to Parliament or submission to a particular person or body but is yet to be presented or submitted.”*

20. In the circumstances of this matter, the agency has decided to defer giving the complainant access to Document 1 under s.25(1)(b) on the grounds that Document 1 has been prepared for presentation to the Council of the agency.

21. Under s.25(1)(b) the agency is required to inform an access applicant of the likely period for which the deferment would happen. The agency did that when the complainant was advised that it expected Document 1 to be presented to the Council of the agency at its ordinary meeting on 18 December 2012.

### ***The agency's submissions***

22. The agency's submissions are contained in its notices of decision referred to in paragraphs [5] and [7] above. In addition, in a letter dated 29 July 2013, in response to my preliminary view, the agency submitted that:

*The initial decision to defer access was made because the Municipal Inventory Review was yet to be endorsed by Council and was at the time of this decision expected to be considered by Council at its Ordinary Meeting 18 December 2012.*

*Following this decision the Heritage Department felt it necessary to have an independent architect undertake a review of all properties recommended for delisting. This review is expected to be complete this week. The independent architect will then submit their recommendations to the Heritage Department. After consideration of these recommendations a report will go to Council. This is expected to be considered by Council at one of its Ordinary Meetings in October.*

### ***The complainant's submissions***

23. In an email dated 25 March 2013, the complainant submits that the agency initially decided to grant him access under s.25(1)(b) on the basis that Document 1 would be released to him by 18 December 2012 but that as at March 2013, the complainant had still not been granted access to Document 1.
24. In addition, the complainant submits that as at March 2013, as no documents had been released to him the agency's decision is not likely to '*...meet the reasonable period test in 25(1).*'
25. Further, the complainant submits that '*...[i]f the Section 25(b) deferral can be continued indefinitely, this seems highly improper...*'

### ***Consideration***

26. The objects of the FOI Act as set out in s.3 are to enable the public to participate more effectively in the governing of the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.
27. In addition, s.3(2) provides, amongst other things, that those objects are to be achieved by creating a general right of access to State and local government documents.

28. Section 3(3) provides that nothing in the FOI Act is intended to prevent or discourage the publication of information, or the giving of access to documents. Further, s.4 of the FOI Act, requires agencies to give effect to the FOI Act in a way that:
- (a) assists the public to obtain access to documents; and*
  - (b) allows access to documents to be obtained promptly and at the lowest reasonable cost; and*
  - (c) assists the public to ensure that personal information contained in documents is accurate, complete, up to date and not misleading.*
29. Section 10 of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. In my view, it is clear from s.10 that the right of access is a qualified right subject to other provisions of the FOI Act, by the inclusion of the words ‘subject to and in accordance with this Act’.
30. Those provisions include, but are not limited to, as in this case, deciding to defer the giving up of access under the provisions of s.25(1)(b) of the FOI Act; and refusing access to a document if the document cannot be found or does not exist (s.26 of the FOI Act).
31. Section 25(1)(b) of the FOI Act provides that an agency may defer giving access to a document for a reasonable period if the document has been prepared for presentation to Parliament or submission to a particular person or body but is yet to be presented or submitted.
32. I consider that in the circumstances of this matter, the Council of the agency is a body as referred to in s.25(1)(b) for the purposes of the FOI Act. The next question for me to decide is whether the agency’s decision to defer the giving of access is for a ‘reasonable period’ as provided for in s.25 of the FOI Act.

### ***Meaning of ‘reasonable’***

33. The term ‘reasonable’, as expressed in s.25, is not defined in the FOI Act. The Macquarie Dictionary (5th edition, 2009) defines ‘reasonable’ to mean:
- ‘...4. Sound judgement or good sense...’*
34. In addition, ‘reasonable’ is defined as meaning:
- ‘1. Endowed with reason. 2. agreeable to reason or sound judgement...3. Not exceeding the limit prescribed by reason; not excessive...’*
35. In *Salaries and Allowances Tribunal v West Australian Newspapers Ltd* [2008] WASC 39, Martin CJ said at [49], when considering a question about the meaning and interpretation of words or phrases used in the FOI Act:

*In my opinion, the question at issue is sufficiently answered by applying the primary approach to statutory construction, which is the application of the natural and ordinary meaning of the words used in the statute to the particular provision of the statute, having regard to that provision in the context of the statute read as a whole, and the objects and purposes of the statute to be inferred from the statute as a whole.*

36. In my view, the meaning of ‘reasonable period’ should be considered in terms of its ordinary dictionary meaning; that is, that it is a period of time which should not be excessive.
37. Given the objects and intent of the FOI Act, it is my view that the Parliament considered that a ‘reasonable period’ would not be an open ended period of time but would be a period which meets the expectations of the ordinary and reasonable person.
38. In the circumstances of this matter, the agency initially informed the complainant that access to Document 1 would be provided in December 2012. Ten months have now elapsed since the agency notified the complainant of that decision and access to Document 1 still has not been provided to the complainant. Under s.25(1)(b) of the FOI Act, an agency may defer the giving of access to a document for a reasonable period. I understand that the Council of the agency meets on a regular monthly basis which has provided it with at least nine opportunities for it to consider and deal with the MI since the access application was lodged. I consider, because access has in effect been deferred for a period of ten months, that is not a reasonable period of time as required by s.25(1).

### ***Conclusion – Section 25***

39. I find the requirements of s.25(1)(b) have not been made out by the agency in the circumstances of this matter. The agency is to give immediate effect to its decision to give the complainant access to Document 1.

### **DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST**

40. Section 26(1) of the FOI Act deals with the obligations of the agency in circumstances where it is unable to locate the documents sought by an access applicant or where those documents do not exist.
41. Section 26 provides as follows:
  - (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.*

42. 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.
43. 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] AATA 201 (1985) 8 ALD 163 and in *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [85].
44. 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].
45. I do not consider that it is my function or that of my staff 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 to be conducted if necessary.

### ***The agency's submissions***

46. The agency submits that it has no additional documents in its possession that come within the terms of the complainant's access application.

### ***The complainant's submission***

47. The complainant submits that as the agency has not identified a number of emails between himself and the agency as coming within the scope of his access application, then it is also likely that the agency has not identified other email correspondence between officers of the agency and the Heritage Architect which also come within the scope of his access application.
48. The complainant provided me with copies of a number of emails between himself and the agency. The complainant has stated that he does not seek access to those documents, but has provided me with copies as evidence that the

agency has not conducted reasonable searches to locate the documents the subject of his access application.

*The inquiries and searches conducted by the agency*

49. The agency has provided me with additional information regarding the searches it undertook to locate the documents the subject of the complainant's access application.
50. In particular, the agency advised me that it had conducted searches of the former Heritage Officer's email accounts; electronic diaries and hard copy records maintained by that officer whilst employed with the agency. In addition, the agency conducted searches of the current Heritage Officer's email accounts, including electronic diaries and hard copy records maintained by that officer.
51. The agency has also confirmed that it made inquiries with the Heritage Architect engaged by the agency to carry out the heritage assessment.
52. The agency advised me that:
  - site meetings between the former Heritage Officer and the Heritage Architect were arranged by phone and e-mail;
  - officers are not required to keep records of correspondence of that nature;
  - the Heritage Architect advised the agency that no handwritten notes were taken;
  - the Heritage Architect provided the draft heritage assessment to the agency on a thumb drive; and
  - the agency does not have in its possession any handwritten notes or file notes relating to the heritage assessment of the complainant's property.
53. 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.
54. On receipt of the complainant's complaint, it appeared on its face that it was reasonable to expect that 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 the assessment of the complainant's property by the Heritage Architect engaged by the agency. The complainant also provided details in support of his claim of the existence of further documents.

55. In my view, it is reasonable to expect that some documentation of the kind requested by the complainant would exist in the agency. I would have expected as a matter of good administrative practice that, if the agency was engaging consultants such as the Heritage Architect, there would be some documentation relating to the engagement. For example, I would consider it reasonable to expect that there would exist some documentation recording, at the least: the fact that the Heritage Architect had been engaged by the agency; the terms of that engagement; and arrangements for meetings or site visits. I would also have expected as a matter of good administrative practice that if an officer of the agency attended those site visits to conduct official business on behalf of the agency, notes of those visits would be made and maintained by the agency.
56. 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.
57. Having regard to all of the searches and inquiries now made, I consider that the agency has taken all reasonable steps to find the requested documents but those documents either cannot be found or do not exist.
58. I do not consider that there are any grounds for requiring the agency to conduct further searches for the requested documents.

***Conclusion – Section 26***

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

***Conclusion***

60. I find that:
- the decision of the agency to defer the giving of access to Document 1 under s.25(1)(b) of the FOI Act is not justified; and
  - the decision of the agency made under s.26 of the FOI Act is justified. The agency has taken all reasonable steps to locate the requested documents and those documents either cannot be found or do not exist.

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