

Participants:

**Alannah Joan Geraldine  
MacTiernan**  
Complainant

- and -

**Minister for Regional Development**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access- documents relating to the Country Local Government Fund - section 15 - transfer of application - deemed decision to refuse access - decision to transfer to be made by Minister - section 26 - documents that do not exist or cannot be found - the searches made by the Minister - whether the searches made before the transfer of the application were reasonable - whether the use of particular search terms were reasonable - whether record keeping practices deficient - whether all reasonable steps taken to locate documents.

*Freedom of Information Act 1992*: sections 12(1)(b), 15, 26(1), 66(4), 76(1) and 100; Schedule 1, clauses 1(1),1(1)(b) and 1(1)(d)(i); Glossary, clause 1

*Freedom of Information Act 1982 (Cth)*: section 16

*State Records Act 2000*

*Bienstein v Attorney-General* [2007] FCA 1174

*Re Campbell and Ministry of the Premier and Cabinet and Ors* [2001] WAICmr 6

*Re Doohan and Western Australia Police Force* [1994] WAICmr 13

*Chu v Telstra Corporation Ltd* [2005] FCA 1730

*Re Anderson and Water Corporation* [2004] WAICmr 22

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

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

## DECISION

The deemed decision of the Minister to refuse access to the requested documents under section 26(1) of the *Freedom of Information Act 1992* is confirmed. My decision is that the Minister has now taken all reasonable steps to find the requested documents and I am satisfied that such documents are either in the Minister's possession but cannot be found, or do not exist.



Sven Bluemmel  
INFORMATION COMMISSIONER

30 October 2009

## REASONS FOR DECISION

1. This complaint arises from a deemed decision made by the Minister for Regional Development ('the Minister') to refuse Hon Alannah MacTiernan MLA ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. On 15 January 2009, the complainant applied to the Minister under the FOI Act for access to:

*"All documents relating to and used in the preparation of the formulae for grant allocations for the Country Local Government Fund.*

*This request includes all emails, attachments, memos, notes, briefing notes, notebook entries, diary notes, correspondence, any record or part record, file notes, computer printouts or any reproduction or photocopy of any of these."*

3. By letter dated 22 January 2009, Ms Anne Polski, the Minister's former FOI Coordinator, advised the complainant that the Minister did not hold the requested documents and that the access application was being transferred in full to the Department of Local Government and Regional Development ('the Department'), as it then was, pursuant to s.15 of the FOI Act. I understand that, thereafter, the Department dealt with the transferred application.
4. On 14 April 2009, the complainant wrote to the Information Commissioner and advised that it was evident from recent statements made by the Minister in Parliament that a document within the scope of her access application did exist and was held by the Minister at the time that her application was made. In support of that advice, the complainant provided me with extracts from *Hansard* dated 9 April 2009 in which the Minister in Parliament said, among other things:

*"After the FOI debate this morning and because I was aware of the document, as I had seen it, I asked my staff to find out why that [Western Australian Local Government Association ('WALGA')] document was not made available under the FOI process. I asked my staff to carry out another extensive search for such documents. One of my staff located an email in a separate archive folder in Microsoft Outlook. This staff member's normal inbox only dates back to 7 November 2008. The document to which the member referred was provided to my office in September 2008. That is why that document did not show up on the initial FOI search that the member requested from my office."*

5. In view of that, the complainant sought external review of the Minister's deemed decision that he did not hold the requested documents.
6. On 24 April 2009, the former A/Information Commissioner accepted the complainant's application for external review outside the prescribed time limit, pursuant to section 66(4) of the FOI Act.

## SECTION 15 - TRANSFER OF APPLICATION

7. Shortly after receiving the complainant's access application, Ms Polski transferred it to the Department under s.15(1) of the FOI Act on the ground that the Minister did not hold the requested documents and the Department had carriage of the matter the subject of the application. Section 15 of the FOI Act, insofar as it is relevant, provides as follows:

- “(1) If the agency does not hold the requested documents but knows, or has reasonable grounds to believe, that the documents are held by another agency (other than an exempt agency), the agency has to transfer the access application to the other agency.*
- (2) If the agency holds the requested documents but the documents originated with or were received from another agency (other than an exempt agency), and are more closely related to the functions of that other agency, the agency may transfer the access application to that other agency together with copies of the documents.”*

8. The wording of s.15 makes it clear that an application can be transferred to another agency in two situations. The first (s.15(1)) is where the agency does not hold the requested documents and the second (s.15(2)) is where it does. In the first situation, a transfer is mandatory; in the second, it is at the agency's discretion.
9. In *Bienstein v Attorney-General* [2007] FCA 1174, Gray J of the Federal Court considered the application of s.16 of the *Freedom of Information Act 1982* (Cth), which relates to the transfer of an access application under that legislation. Although the wording of that provision is not identical to that of s.15 of the FOI Act, it includes the situation where an agency does not hold the requested documents. In *Bienstein*, Gray J said at [34]-[36], in relation to that issue:

*“The question whether a document is in an agency's possession can only be answered after the agency has made any necessary search for that document...a transfer can only be put into effect after an agency has conducted a search to ascertain whether or not it has the document sought ... It is true that there is not to be found in the provisions of the FOI Act any express imposition of a duty on the recipient of a request for access to documents to search its records to ascertain whether it has documents answering the description in the request. Such a duty is implicit, however.”*

10. I agree with that view and consider that the statement in s.15(1): “*If the agency does not hold the requested documents ...*” implies that the agency has conducted searches for those documents. Until an agency has conducted searches, it cannot know whether or not it holds the requested documents.
11. The complainant submits that it is evident from *Hansard* of 9 April 2009 that, prior to the transfer of her application, the Minister did not conduct reasonable searches for the requested documents. While *Hansard* does indicate that a relevant document was not found in initial searches, it does not necessarily follow that the searches were manifestly unreasonable. Before transferring the application, Ms Polski conducted searches of all staff directories and the Records Management system. When those searches failed to identify any documents Ms Polski consulted the Chief of Staff who could recall no relevant documents being held by the agency and advised that the Department had carriage of the relevant matter. Although more thorough searches could have been made (and notwithstanding the fact that the decision to transfer the application should have been made by the Minister, as discussed in paragraphs 14-18 below), I consider that it was reasonable for Ms Polski, at that point, to take the view that the complainant’s application should be transferred to the Department.
12. In *Re Campbell and Ministry of the Premier and Cabinet and Others* [2001] WAICmr 6, the complainant sought access under the FOI Act to documents held by the then Ministry of the Premier and Cabinet (‘the MPC’). The MPC conducted searches for the requested documents but subsequently advised the complainant that it did not hold the documents and transferred the application to another agency, which it considered more likely to hold them. In that case, the Information Commissioner reviewed the MPC’s decision on the basis that it was a deemed decision to refuse the complainant access to documents pursuant to s.26 of the FOI Act. While not having the power to review an agency’s decision to transfer an access application, the Commissioner does have jurisdiction to review an agency’s decision to refuse access on the ground that it does not hold the requested documents.
13. I agree with that view and, accordingly, I have dealt with this complaint as a review of a deemed decision of the Minister to refuse the complainant access to documents, pursuant to s.26 of the FOI Act. In other words, a decision to transfer an application under s.15(1) implies that the relevant agency has decided that it does not hold the requested documents.

***The decision to transfer the access application***

14. In the course of dealing with this complaint, the complainant queried whether her application had been brought to the attention of the Minister before it was transferred to the Department, since the Minister was cited in *Hansard* as stating that he knew about the existence of the disputed document. Ms Polski’s response to that query is as follows:

*“It is not the policy of this agency to refer every access application made under the FOI Act immediately to the Minister. The reason for this policy*

*is that when an access application is received it is the responsibility of the FOI Coordinator to conduct the search as necessary in order to identify the documents. The FOI Coordinator will liaise with such members of the Minister's Office (including the Minister if appropriate) in order to identify all documents. However, following this application the Minister has requested all access applications be provided to him upon receipt for his information. The Chief of Staff is advised of all access applications."*

15. In my view, it is appropriate that a Minister to whom an access application is directed should be advised of that application as soon as possible and, in any event, before the time that he or she is called upon to make a decision. However, I note that it may not always be possible to advise a Minister immediately, for example, when a Minister is interstate or overseas. In the present case, it appears that the Minister was not advised of the receipt of the complainant's access application before or at the time that the decision was made to transfer the application to the Department.
16. Clause 1 of the Glossary to the FOI Act defines the meaning of words used in the Act. The term 'agency' is defined to mean (a) a Minister or (b) a public body or office and 'the agency' means the agency to which an access application has been made or to which such an application has been transferred. Consequently, unless the contrary intention appears, a Minister is regarded as an agency for the purposes of the FOI Act.
17. Clause 1 of the Glossary also defines 'principal officer' of an agency to mean "*in relation to an agency that consists of one person (not being an incorporated body) – that person.*" Accordingly, a Minister for the purposes of the FOI Act is both an agency and the principal officer of that agency. That has consequences for decisions made by a Minister since s.100 of the FOI Act provides:

*"(1) Decisions made under this Act by an agency are to be made by –*

- (a) the principal officer of the agency; or*
- (b) an officer of the agency directed by the principal officer for that purpose, either generally or in a particular case.*

*(2) Subsection (1)(b) does not apply if the agency is a Minister."*

Therefore, where an application is made to an agency which is a Minister, the agency's decision must be made by the Minister as that agency's principal officer and not by any person directed by the Minister.

18. In the present case, the relevant agency - being the Minister - made a decision to transfer the complainant's application to another agency. The term 'decision' is not defined in the FOI Act or the *Interpretation Act 1984*. Consequently, I understand it to have its plain dictionary meaning being "*1 the act or process of deciding. 2 a conclusion or resolution reached, esp. as to future action, after*

*consideration ...*” (*The Australian Concise Oxford Dictionary*, Fourth Edition, p.359). In my opinion, the word ‘decisions’ in s.100 includes, amongst other things, a decision to transfer an access application. On the information before me, the decision to transfer the complainant’s access application was not made by the Minister but by the former FOI Coordinator, in contravention of s.100 of the FOI Act. Had the Minister made the decision to transfer the application, as required by the FOI Act, the Minister would have been in a position to advise his staff of the existence of one of the requested documents, which was found by the Minister’s office in the course of my external review.

## REVIEW BY INFORMATION COMMISSIONER

19. Following the former A/Commissioner’s acceptance of this complaint, my office sought further information and clarification from the Minister. In the course of dealing with this matter I obtained statements and information from the following members of the Minister’s office: Ms Polski, FOI Coordinator; Mr Doug Cunningham, Chief of Staff; and Mr Phil Chapman, Executive Support Officer.
20. The Minister’s office provided the former A/Information Commissioner with a copy of the document referred to in *Hansard*, which had been brought to his attention by the complainant. That document consists of an email dated 24 September 2008 attaching a discussion document prepared by WALGA (‘the WALGA document’). The Minister claimed that the WALGA document was exempt under clause 1 of Schedule 1 to the FOI Act.
21. On 10 June 2009, after considering the WALGA document, the agency’s FOI file and the information provided by the complainant and the Minister’s office, I wrote to the parties setting out my preliminary view of the complaint. On the information before me at that time, I considered that the covering email was not exempt under clause 1 but that the attached document was exempt under that provision. It was also my preliminary view, on the information provided to me by the Minister’s office, that the Minister had, at that point, taken all reasonable steps to find the requested documents but that further documents could not be found or did not exist, pursuant to s.26(1) of the FOI Act.
22. In response to my preliminary view, the complainant wrote to me on 18 June 2009 to say that she was not satisfied with the information given to me by the Minister and his staff. The complainant enclosed extracts from *Hansard* dated 11 and 16 June 2009 to demonstrate that the Minister had claimed “*that he had personally developed the formula for the Country Local Government Fund* (‘the CLGF formula’)”. The complainant said that, in her view, it was inconceivable that the Minister’s office was not aware of this.
23. I note that *Hansard* for 9 April 2009 records the following comments made by the Minister in relation to the development of the CLGF formula:

*“The local government association provided some interim advice to me on a way to roll out the country local government fund. We looked at that advice. With the Minister for Local Government and the Department for*

*Local Government and Regional Development, we worked on that formula ...”*

*“I then worked with the Minister for Local Government and the Department for Local Government and Regional Development to come up with a formula that could best allocate that \$100 million. I then took that formula to cabinet for endorsement to distribute \$100 million worth of funds.”*

*“The Department of Local Government and Regional Development, the Minister for Local Government and I devised the formula ... I worked with both the department and the Minister for Local Government to develop that formula.”*

*“I worked very closely with Jennifer Mathews, the Director General of the Department of Local Government and Regional Development, and her staff to put this formula together. They were the people with experience in this matter.”*

24. In light of the complainant’s response, I made further detailed inquiries with the Minister, the Minister’s Chief of Staff and the Director General of the Department in relation to additional documents which might exist and I invited the Minister to respond to the complainant’s submissions.
25. On 10 July 2009, the Minister’s Chief of Staff provided me with answers to my queries and also advised that an additional four documents coming within the scope of the complainant’s access application had now been located. The Minister provided me with both the originals and copies of those documents and claimed that all were exempt under clause 1 of Schedule 1 to the FOI Act. In addition, the Minister gave the complainant access to the covering email in the WALGA document which, in my preliminary view, was not exempt under clause 1.
26. My A/Principal Legal Officer wrote to the complainant to advise her of the responses given by the Minister’s office and the Director General of the Department to my queries and to advise that, in her opinion, the four additional documents were likely to be exempt under clause 1, as claimed by the Minister. The complainant was invited to provide me with further submissions in relation to those documents.
27. By email dated 15 September 2009, the complainant responded to my officer’s letter and accepted that the four additional documents were likely to be exempt under clause 1. Following further correspondence in relation to those four documents and the WALGA document, the complainant advised that she withdrew her complaint in relation to those five documents but maintained her complaint in respect of the adequacy of the searches made for the requested documents.

28. Consequently, the only matter that remains for my determination is whether all reasonable steps have been taken to find documents that come within the scope of the complainant's access application.

## **SECTION 26 - DOCUMENTS THAT DO NOT EXIST OR CANNOT BE FOUND**

29. Section 26 of the FOI Act deals with the obligations of an agency in circumstances where it is unable to find the documents sought by an access applicant or where those documents do not exist. Section 26(1) provides:
- “(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.”*
30. When dealing with such an issue, the following questions must be answered:
- Are there reasonable grounds to believe that the requested documents exist or should exist?
  - Are the requested documents held - or should the requested documents be held - by the agency?

If those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find the documents.

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

31. The complainant submits that *“in light of the contradictions in the evidence and the clear admission by the Minister for Regional Development that he developed the [CLGF] formula”* further searches should be made for documents within the scope of the application. The complainant is not satisfied with the searches made and she is not persuaded by the reasons put forward by the Minister's Chief of Staff as to why the documents held by the Minister were not identified previously, since the issue was a matter central to the Minister's policy agenda.

### **The existence of the requested documents**

32. It has been established that at least five documents within the scope of the access application exist and are held by the Minister. Those documents are the WALGA document and four day sheets dated 6 October 2008 and 3, 10 and 24

November 2008, attaching briefing notes and submissions. On the information before me, I am satisfied that there are reasonable grounds to believe that documents of the kind requested by the complainant exist and are held, or would once have been held, by the Minister.

33. The next question for my determination is whether the Minister has taken all reasonable steps to find the documents described by the complainant in her access application.
34. I emphasise that it is not usually my function on external review to attend an agency to search in person for 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 Minister's searches and inquiries**

35. The Minister's office received the complainant's access application on 19 January 2009. From the information and material provided to this office on 5 and 29 May 2009, I understand the following:
  - TRIM is the Records Management System of the Department of the Premier and Cabinet and is used in all Ministerial offices. TRIM contains copies of all hard-copy documents received in the Minister's office but that database only includes electronic correspondence that has been forwarded by staff to the Minister's Correspondence Officer.
  - Email correspondence not stored on TRIM may be retained in a shared repository (the H drive), which is why that repository is also searched on receipt of any FOI application for correspondence. However, emails are not automatically saved in that repository. A search of the H Drive will search every document in every directory in that drive for whichever key word is entered into the search parameters.
  - The email application used by the Minister's office is Microsoft Outlook and emails are stored individually in each staff member's Outlook account.
  - Ms Polski explained that her usual procedure on receipt of an access application is to send a formal request to all staff members of the Minister's Office advising generally of the nature of the access application and asking any officers with relevant documents and/or information to refer those to Ms Polski.
  - In this case, Ms Polski conducted searches of TRIM and the H Drive using the key words 'grant allocations', 'formulae' and 'Country Local Government Fund', which she selected from the words used in the complainant's application letter. Those searches - which did not include

the emails held by staff in their Outlook accounts - found no documents within the scope of the complainant's access application.

- A file note on the Minister's FOI file states that Ms Polski discussed the complainant's application with the Chief of Staff who advised her that no-one in the office was involved with the CLGF formula and suggested that Ms Polski transfer the application to the Department, as the agency dealing with that matter. In light of that advice and her own searches, Ms Polski transferred the application without conducting full searches to locate documents held by other staff members and without referring the matter to the Minister for his decision on that transfer.
  - The Chief of Staff advises me that, on 24 September 2008 - which was the State Government's first day in office following the State election - a delegation from WALGA met with the Minister and discussed a document that WALGA had prepared. Mr Cunningham did not attend that meeting but asked Ms Aila Dann, the Minister's Principal Policy Adviser Regional Development, to arrange for WALGA to forward an electronic version of that document to the Minister's office for record-keeping purposes. Mr Cunningham notes that it was forwarded to Ms Dann the same day, which was an extremely busy time when staff, equipment and papers were being moved from the Minister's Parliamentary office to Dumas House. Mr Cunningham advises that he did not receive the WALGA document through his email or have it logged into his computer system.
  - Mr Cunningham also advises me that, during questions in State Parliament on 9 April 2009, he recalled his earlier instructions to Ms Dann to obtain an electronic version of the WALGA document for logging into TRIM. In light of that, he asked the Minister's Executive Support Officer, Mr Phil Chapman, to conduct a search of Ms Dann's emails and computer files. As a result of those searches, the WALGA document was identified.
  - Mr Chapman advises me that, following questions in Parliament on 9 April 2009 about FOI applications received by the Minister, the Chief of Staff asked him to search for a document from WALGA concerning the CLGF. Searches of TRIM had no result but Mr Chapman's subsequent search of Outlook email accounts located the WALGA document in an archived email folder of Ms Dann.
36. I understand that the WALGA document was not entered into TRIM until 28 May 2009. Before that time, it formed part of the electronic correspondence that had not been referred to the Correspondence Officer for entry into TRIM.
37. Having found the WALGA document, the Minister's office conducted further searches of TRIM and the H Drive on 22 May and 25 May 2009. This time, the keywords used in the searches for the requested documents were 'Country Local Government Fund'; 'Country Local Government Fund Formula'; 'CLGF'; 'CLGF Formula'; 'Local Government Fund'; 'Local Government Fund

Formula'; and 'WALGA'. The Minister has advised me that keywords such as 'WALGA', 'Western Australia Local Government Association', 'Royalties for Regions' or 'Regional Local Government Development Strategy' were not terms used in the complainant's access application and, therefore, it was not apparent that searches should be conducted using those terms.

38. I understand that those further searches included the email folders (including archive folders) of the Minister and all of the Minister's staff except for the Correspondence Officers and the Receptionist. The latter officers' files were not searched "*because they are the staff who enter the documents onto TRIM. They are cognisant of entering and uploading documents onto TRIM and are responsible for entering all correspondence received via the Minister's email.*"
39. The emails in each staff member's Outlook account are stored for 55 days, after which time they are moved into an archive folder. Ms Polski advised me as follows:

*"When a search of Microsoft Outlook is undertaken, that search will not search the archive box. Accordingly, if a person wishes to search for archived emails they must conduct a separate search in the individual officer's archive box.*

*Prior to the receipt of this access application, I (and others in this Office) was not aware of this feature on Microsoft Outlook. I have been advised that this is a relatively new feature."*

I understand the term 'archive box' to mean an archive file which is a Microsoft Outlook Personal Folder file having a .PST extension. Archive files need to be explicitly opened within Outlook before they can be searched.

40. In the course of dealing with this complaint, I requested a copy of the archive policy document relevant to the Minister's record-keeping function. That document - entitled "*Recordkeeping Part 4 Disposal Instructions for Minister's Records (July 2008)*" - only provides guidelines for archiving records of a Minister's office at the end of a term of government. In relation to electronic records, that document says, at page 15: "*Electronic records must be printed and filed. Electronic working papers should be assessed for their value and if retained should be copied to CD ROM*". The CD ROM is then transferred to secure access-controlled secondary storage until transferred to the State Archive collection or until it becomes eligible for destruction under the *State Records Act 2000*.
41. As noted in paragraph 25 above, on 10 July 2009, the Minister's Chief of Staff responded to my queries and gave me the following information:
- The Minister received briefings from the Department on 6 October 2008 and on 3, 10 and 24 November 2008, in relation to a variety of matters within the Minister's portfolio, including the CLGF.

- A joint briefing was held on 3 November 2008 between the Minister, the Department and the Minister for Local Government.
  - The Minister also held two meetings with the Minister for Local Government in relation to the CLGF prior to its public launch on 16 December 2008.
  - The Department gave the Minister regular briefings in relation to matters falling within the Minister's portfolio which included, on the dates referred to above, briefings in relation to the CLGF and the formula for grant allocations for the CLGF. Briefing notes and agendas for those regular briefings were generated by the Department but the routine practice was to return those documents to the Department.
  - The Department had total carriage of the work associated with the CLGF. The Minister has limited documentation concerning that matter because members of his staff were not required to undertake any tasks or activities following discussions and briefings on that issue. Notes are generally only made when staff members are required to undertake specific tasks.
42. In the course of responding to my queries, the Chief of Staff conducted a review of the process used by the Minister's office to deal with FOI applications. As a result of that review, the Minister's Appointment Secretary informed the Chief of Staff that there were four documents relevant to this matter in the Minister's day sheet file. The Appointment Secretary did not recall being asked to search for records other than emails and TRIM records and stated that, as a general practice, she returned folders containing hard-copy agendas and briefing notes to the Department. However, for her own file purposes the Appointment Secretary had attached photocopies of those documents to the day sheets but did not log that material into TRIM. As noted at paragraph 27, the complainant has since withdrawn her complaint in respect of the four documents mentioned above.
43. The Chief of Staff acknowledges that procedures should have been in place to log documents such as those referred to here into TRIM so that they are readily identifiable and the processes listed below have now been put in place to ensure that this happens in future:
- Staff members have been instructed to log all departmental and agency briefing notes sent to the Minister or staff members directly into TRIM on the day that they arrive, both email and hard copies.
  - The primary recipient must take this action and, in the case of the Minister, his Chief of Staff or the FOI Coordinator.
  - Copies of departmental and agency briefing notes will be attached to the Minister's day sheet by the Appointments Secretary with the TRIM number included.

- Staff members are to keep on their individual files only hard copies of working documents that have a TRIM number.
- Working documents that are the subject of general email traffic between Ministerial staff and agencies will be captured in TRIM.
- All Microsoft Outlook boxes, including archived items are to be searched on receipt of an access application.
- Policy Advisors are to check their offices for any hard-copy documents such as meeting notes and minutes that may have been hand delivered.

44. The Chief of Staff also advises me as follows:

- No documents have been located for the meetings with the Minister for Local Government held on 3 and 21 November 2008.
- No documents were generated in relation to the meetings held on 6 October 2008 and on 3, 10 and 24 November 2008, as there were no tasks undertaken by Ministerial staff that required documents to be created.
- He was present at all of those meetings, except for the meeting held on 6 October 2008 and, although it is likely that he would have had some general discussion with the Minister relating to the CLGF, he cannot now recall specific dates or details of such discussions. No records were made of those general discussions.

### Consideration

45. Section 12(1)(b) of the FOI Act requires applicants to give agencies enough information to enable the requested documents to be identified. In the present case, at the time that Ms Polski received the complainant's access application, she searched for the requested documents using as keywords the terms "Country Local Government Fund", "grant allocations" and "formula" or "formulae", which were taken from the complainant's application. Unfortunately, the WALGA document and its covering email do not on their faces contain those terms, referring instead to "Royalties for Regions", "Regional Local Government Development Fund", "WALGA" and "Discussion Document". In consequence, it is likely that the WALGA document would not have been found by simply relying on electronic searches alone.
46. In my view, it is reasonable for FOI Coordinators, when searching for documents, to use as initial search terms the words used by complainants in their access applications. However, s.4 of the FOI Act sets out the principles to be observed in administering the Act and includes the following:

*"Agencies are to give effect to this Act in a way that –*

*(a) assists the public to obtain access to documents".*

In my view, this requires FOI Coordinators to apply their minds to the words used in the access application and to make reasonable judgments about how to undertake the searches for documents. Simplistically limiting search terms to those outlined in the access application may not be sufficient to meet this requirement.

47. The extent to which the FOI Coordinator needs to look beyond the wording of the access application will depend on the circumstances of any given application. If at any stage, it is apparent that other search terms would be relevant, it is incumbent upon the agency to conduct searches using those terms for key word searches. However, in the present case, Ms Polski's searches and inquiries did not indicate that other search terms might be relevant.
48. I also note that the keyword searches conducted by the Minister's office on 22 and 25 May 2009, referred to in paragraph 35 above, would have different results in the event that they had either no quotation marks (or single quotation marks – which would produce the same results as no quotation marks) or double quotation marks surrounding them. Also, a search term surrounded by double quotation marks such as "CLGF Formula" will only locate text which has those two terms adjacent to each other. For instance, that particular search would not have found any document containing the text '...CLGF and the formula for grant allocations for the CLGF' as the exact phrase "CLGF Formula" does not appear within that string of text. To locate any document containing that string of text the keyword searches would need to be as follows: CLGF AND formula (or 'CLGF AND Formula'). In my view, it is essential that the FOI Coordinator or Records Officer in charge of conducting searches under the FOI Act is fully trained and conversant with the tools to search electronic systems.
49. Although the Minister did not make the decision to transfer the complainant's application, as required by the FOI Act, the external review process provides the complainant with an independent avenue of review. However, as I observed in paragraph 34, when an agency claims that documents cannot be found or do not exist, it is not usually the role of the Information Commissioner to physically go into that agency and conduct searches for documents on behalf of an applicant. Instead, the Commissioner's role is to determine whether there are reasonable grounds for believing that the requested documents exist and, if so, to determine whether the agency has taken all reasonable steps to find the documents. If necessary, the Commissioner will require the agency to undertake further searches.
50. Applicants seeking to exercise their rights of access under the FOI Act must, to some extent, rely on the integrity of the searches conducted by the relevant agency. If additional documents are located after further searches, it is understandable that an applicant may be sceptical about the adequacy of the agency's efforts to meet its obligations under the FOI Act in the first instance.

51. In the present case, the Minister's Chief of Staff has acknowledged that the record-keeping system in the Minister's office was deficient for the purposes of the FOI Act and, as a result, the five documents that were subsequently located could not easily be identified.

52. With regard to the WALGA document, the Minister said, in his letter to the former A/Commissioner of 5 May 2009:

*"It appears to this agency that the reason the email and attached WALGA discussion document were not discovered during Ms Polski's original search is because she was not aware of the WALGA document and so did not search for "WALGA" which would have uncovered the document in the H Drive."*

53. However, I understand from the Minister's further submissions in relation to Ms Dann's archive folder, that the WALGA document would not have been located by a search of the H Drive using the search term 'WALGA' because only the staff directories would have been searched and not the Outlook accounts, which was where the WALGA document was ultimately located. In addition, at the time that Ms Polski's searches were made, she was not aware that emails held for more than 55 days were moved into archive folders which required separate searches. Moreover, no electronic searches for the other four documents would have been successful, since those documents were hard-copy documents that had not been entered into the electronic database.

54. The FOI Act does not require agencies to guarantee that their record-keeping systems are infallible. In *Re Doohan and Western Australia Police Force* [1994] WAICmr 13 at [28], the former Commissioner recognised that documents may not be readily found for a number of reasons including misfiling; poor record keeping; ill-defined requests; proliferation of record systems; unclear policies or guidelines; inadequate training in record management; or simply that the documents do not exist. At the same time, the Federal Court in *Chu v Telstra Corporation Ltd* [2005] FCA 1730 has commented - in relation to the provision in the *Freedom of Information Act 1982* (Cth) that corresponds to s.26 of the FOI Act - that the relevant provision is not meant "*to be a refuge for the disordered or disorganised.*"

55. Although it is not my role to examine in detail an agency's record-keeping practices, part of my function 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 (s.63(2)(d) and (f)). In my view, those functions include highlighting deficiencies in an agency's record-keeping practices that may impact upon the proper functioning of the FOI Act, where such deficiencies are uncovered in the course of an external review.

56. In *Re Anderson and Water Corporation* [2004] WAICmr 22 at [28], the former A/Commissioner said in relation to the operation of s.26 of the FOI Act:

*“One of the stated objects of the FOI Act is “... to make the persons and bodies that are responsible for State and local government more accountable to the public” (s.3(1)(b)). One of the means of achieving that accountability is the creation of a general right of access to State and local government documents (ss.3(2)(a) and 10). If government decisions – particularly those which directly affect individuals – and the processes by which those decisions were made are not properly documented, the accountability that the FOI Act is designed to further is significantly diminished. A lack of proper records is also an inadequate administrative process which is inconsistent with the requirement of the State Records Act 2000 that each agency have, and comply with, a record-keeping plan that, among other things, ensures that the records kept by an agency properly and adequately record the performance of its functions (s.16(2)(b)).”*

57. To that I would add that accountability cannot be achieved, and a general right of access to documents is undermined, if agencies’ processes and searches are not sufficient to enable them to locate documents in their possession.
58. In the circumstances of this matter, I am satisfied that the Minister has taken appropriate steps to rectify the problems identified by this external review in order to improve the integrity of searches made under the FOI Act in future. I note the importance of good record keeping systems and the need to ensure that members of staff are trained to conduct comprehensive searches of those systems - particularly the electronic systems - to ensure the proper functioning of the FOI Act.

***Has the Minister taken all reasonable steps to find the requested documents?***

59. The final question for my determination is whether the Minister has taken “*all reasonable steps*” to find the requested documents, as required by s.26 of the FOI Act. In *Chu*, the Federal Court, at [14], considered that the question of whether or not “*all reasonable steps*” had been taken to locate documents was a judgment to be made by the relevant decision makers and was not a question, ultimately, for the Federal Court. In other words, that question is a question of fact for the decision-maker. Consequently, I consider that, on external review, the judgment as to whether all reasonable steps have been taken to locate the requested documents is a judgment for me to make, based on the circumstances and the material before me.
60. Section 76(1) of the FOI Act empowers the Commissioner to ‘stand in the shoes’ of an agency by reviewing any decision made by an agency and deciding any matter in relation to an access application that could have been decided by the agency. In this case, the question of whether the Minister has taken all reasonable steps to find the requested documents has arisen only on external review.
61. As noted by the former Commissioner in *Re Boland and City of Melville* [1996] WAICmr 53 at [27], the question is not whether an agency has taken every possible step to locate documents, but whether it has taken all reasonable steps.

The adequacy of efforts made to locate documents is to be judged by having regard to what is reasonable in the circumstances: *Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* (1985) 8 ALD 163 at 170.

62. Having considered the information, material and statements now provided to me by the Minister's office, and taking into account the further searches and inquiries made by the Minister's staff for the requested documents, I am satisfied that the Minister has now taken all reasonable steps to locate the requested documents but that further documents of that kind are either in the Minister's possession but cannot be found or do not exist. Accordingly, I confirm the agency's deemed decision to refuse access under section 26 of the FOI Act.

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