

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

**File Ref: F2009326
Decision Ref: D0362009**

Participants:

David Baxter Cox
Complainant

- and -

Town of Claremont
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access to documents - documents relating to a parking infringement - section 26 - documents that do not exist or cannot be found - searches and inquiries made for the requested documents - whether all reasonable steps taken to find the documents.

Freedom of Information Act 1992: ss. 3(1)(b), 26(1), 63(2)(d) and 63(2)(f)
State Records Act 2000

Re Doohan and Western Australia Police Force [1994] WAICmr 13
Re Anderson and Water Corporation [2004] WAICmr 22

DECISION

The agency's decision is confirmed. I find that all reasonable steps have now been taken to find the requested documents and further documents are either in the agency's possession but cannot be found, or do not exist.

Sven Bluemmel
INFORMATION COMMISSIONER

31 December 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by the Town of Claremont ('the agency') to refuse Dr David Cox ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In early April 2009, the agency issued the complainant with a parking ticket. On 5 April 2009, the complainant wrote to the former Chief Executive Officer ('CEO') of the agency, in a letter marked 'personal and confidential', attaching the infringement notice (which I understand included a remittance advice and payment methods form) and a cheque for \$50 as payment for the parking infringement ('the First Letter'). In the First Letter, the complainant also requested a receipt and information on how to obtain a residential parking permit.
3. Having received no response to the First Letter, the complainant contacted the agency, which advised him that it could find no record of the First Letter, its attachment or the payment made. On 27 May 2009, the complainant wrote to the agency to express his concerns that the First Letter could not be found and that the parking infringement might still be outstanding ('the Second Letter').
4. By letter dated 23 June 2009, the CEO apologised to the complainant for the apparent loss of the First Letter and advised that the agency's records and front office staff were addressing that issue. The CEO confirmed that the agency held a printout of the infringement notice and a copy of the receipt of payment (dated 7 April 2009) issued to the complainant and he enclosed copies of those documents.
5. On 22 June 2009, the complainant applied to the agency under the FOI Act for access to the following documents:
 - a) The First Letter.
 - b) The infringement notice attached to the First Letter.
 - c) All records, including all ledgers and account records, relating to the agency's receipt of a cheque for \$50 dated 5 April 2009 - cleared by the agency's bank on 8 May 2009 - ('the Cheque'), which was enclosed with the First Letter.
 - d) All notes, emails, file notes, telephone attendances, memoranda and any other internal document referring to the First Letter, its enclosures and attachments or any subject matter relating to those documents.
 - e) All correspondence from the agency to the complainant in response to the First Letter.

- f) All bank statements, bank deposit slips or other documents that record the deposit of the Cheque into the agency's bank between 5 and 8 April 2009.
 - g) The Second Letter.
 - h) All correspondence from the agency to the complainant in response to the Second Letter.
6. On 6 July 2009, the agency provided the complainant with a document schedule listing nine documents that came within the scope of his application. The agency decided to give access in full to six documents and access to edited copies of the remaining three documents. The agency advised that it could not locate the First Letter or the infringement notice attached to it and referred the complainant to 's.24A' of the FOI Act in that regard. Although that particular provision does not appear in the FOI Act, the wording used by the agency was taken primarily from s.26 of the FOI Act, which deals with documents that cannot be found or do not exist.
 7. The complainant sought clarification of the agency's notice of decision and, on 22 July 2009, requested internal review of the decision. On 28 July 2009, the agency confirmed its original decision noting that, in relation to items (a) and (b) of his application, further searches had failed to locate those documents.
 8. On 23 August 2009, the complainant applied to me for external review of the agency's decision.

REVIEW BY INFORMATION COMMISSIONER

9. Following the receipt of this complaint, the complainant advised me that Documents 1-5 on the agency's schedule of documents did not relate to him but to a third party. Those documents are:
 - Document 1 – a remittance advice slip.
 - Document 2 – a payment methods slip.
 - Document 3 – a payment receipt.
 - Document 4 – a printout from the agency's Enforce-IT infringement system.
 - Document 5 – an extract from a banking list showing cheques received.
10. The complainant pointed to the fact that the details of the car in those documents related to the car of a third party and not to his car. In my view, a careful perusal of those documents would have revealed that they were not relevant to the complainant's application and they should not have been disclosed to him.
11. The complainant considered that documents equivalent to Documents 1-5 should exist in relation to him but that those documents had not been identified.
12. In addition, the complainant referred me to Document 8 on the agency's schedule of documents, which was disclosed to him in full. Document 8 is an

internal agency email dated 27 May 2009, which indicates that the original infringement notice (item (b) in the complainant's application) was held by the agency at that date. The complainant also requested that further inquiries and searches should be made and provided my office with additional information to support his view that further documents should exist.

13. In light of that, the agency was asked to provide me with a copy of its record-keeping policies and details of the searches and inquiries made in relation to the complainant's application. The agency was also advised that it had apparently disclosed third party information to the complainant.
14. The agency conducted additional inquiries and searches for the requested documents, in the course of which a number of additional documents were located and disclosed to the complainant.
15. In brief, the agency provided the complainant with the equivalents of Documents 4 and 5 as they related to him and advised that Document 6 (which related to the complainant) was the equivalent of Document 3 (which related to the third party) albeit in a different format. Having compared those two formats, my A/Principal Legal Officer considered that one of the formats gave more information than the other. In light of that, the agency gave the complainant a copy of Document 6 in the same format as Document 3. The agency also located a series of photographs of the complainant's car taken at the time it issued the parking infringement. However, the agency was still unable to locate items (a) and (b) as set out in the complainant's access application.
16. Notwithstanding the release of those additional documents, the complainant was not prepared to withdraw his complaint, although he provided my office with no further suggestions as to additional searches or inquiries that the agency could make.

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

17. 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.”

18. When dealing with section 26 matters, I must consider whether there are reasonable grounds to believe that the requested documents exist or should exist and whether the requested documents are held or should 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

19. In his letter to me seeking external review, the complainant was concerned that his correspondence to the agency could go missing and submitted that the agency had not undertaken a diligent search for the requested documents.

The agency's searches and inquiries

20. The agency's notices of decision did not describe the searches and inquiries it had undertaken to locate the requested documents. In my opinion, a good notice of decision should set out the steps an agency has taken to locate the requested documents, so that an applicant may be satisfied that "all reasonable steps" have been taken to find them. By setting out the steps taken to locate documents, applicants are given an opportunity to suggest further relevant searches or inquiries that might be made.
21. With regard to the searches made for the First Letter and its attachment, the agency says that its procedure on receipt of correspondence is as follows:
- All incoming mail "*is counted and recorded in the records management statistics*" by the Records Team in Records Services.
 - The Records Team then enters all business correspondence into the agency's electronic document records management system ('the EDRMS').
 - Once registered, the business correspondence is attached to a file or temporary file and distributed to officers for actioning. Responses to that correspondence by officers are registered by those officers in the EDRMS. Once action is completed, the file, including the response letter, is returned to Records Services for filing.
 - The EDRMS does not track the actioning or workflow of that correspondence.
 - Exceptions to entry into the EDRMS are (i) cheques and invoices which go to Customer Services/Finance Department for processing (but if the cheque or invoice is attached to business correspondence it will be entered into EDRMS); (ii) ephemeral correspondence; and (iii) correspondence categorised as personal or marked "private and confidential".
 - Personal/Private correspondence is date-stamped on the envelope and distributed unopened by the Records Team to the addressee. It is the

addressee's responsibility to return the correspondence to Records Services for processing if it is business-related.

22. The agency states that, at the time that it received the First Letter, no statistics were kept on personal and private correspondence. This has now been changed so that letters marked 'private and confidential' are now recorded in the records management statistics prior to their distribution. The agency notes that because the First Letter was marked 'personal and confidential' it would have been treated as personal/private correspondence and forwarded date-stamped but unopened to the CEO. Usually where, as here, the matter relates to Council business, it is returned to Records Services for entry into the EDRMS.
23. The agency advises me that inquiries were made with the CEO and his Executive Officer but that neither could recall having read the First Letter. Although both of those officers conducted searches of their hard copy and electronic files, the First Letter could not be located. Since that document was not returned to Records Services, it was never entered into the EDRMS.
24. The agency states that usually it would file correspondence such as the First Letter on the relevant file in Records – which in this case would have been a file relating to parking infringements. Any attached cheques would normally be sent to the Customer Services Supervisor for receipting in the agency's financial system, known as the Property Wise System.
25. In the course of dealing with the complainant's access application and on external review, the agency's FOI Coordinator:
 - made inquiries for the requested documents with the Records Team members; the CEO; the Executive Officer; the Executive Manager Regulatory Services; the Executive Manager Corporate and Governance; the Senior Ranger; the Rangers Administration Assistant; and the Customer Services Officer;
 - made physical searches of files LAW0001 and LAW0046 (Laws and Enforcement – Appeals – Infringement – Parking); and
 - requested Rangers and Customer Service to conduct searches of the Enforce IT and Property Wise systems and their hard-copy remittance advices or receipt files.
26. Document 8 – which was released in full to the complainant – is an email of 27 May 2009 from the former Administrative Officer of the Rangers Department to the former CEO, which said "*All that remains now is the original infringement ... I have spoken with Records and it has been agreed that judging by the stamp on the back of the infringement notice that it was during the time there was a temporary staff member ...*".
27. I understand that the agency has been unable to contact the Administrative Officer to make further inquiries as she had left the agency's employment before the complainant lodged his access application with the agency.

28. Accordingly, it appears that by 27 May 2009, the date on which Document 8 was created, the agency had lost or misfiled the First Letter but had processed the Cheque, which was attached to that letter, and was holding the original of the infringement notice, which was also attached to the First Letter. However, by the time the agency received the complainant's FOI application on 24 June 2009, the original infringement notice - which should have been filed in the Finance/Customer Services area - had also been lost or misfiled. The agency advises me that the complainant's remittance advice, the payment methods slip and the original infringement notice would usually be kept together in the agency's recordkeeping system.
29. In the event, the agency has been unable to locate the equivalents of Document 1 (the remittance advice slip) and Document 2 (the payment methods slip) or the First Letter. The agency is unable to explain how the First Letter went missing, although I note that the CEO, in his letter to the complainant of 23 June 2009, speculates that it occurred at a time when the agency had engaged a temporary records officer.

Consideration

30. Having considered all of the information before me, it is evident that at least six documents within the scope of the access application (four photographs and the equivalents of Documents 3 and 4) existed and were held by the agency at the time of the complainant's access application. However, the agency did not find and disclose those documents to the complainant in the course of dealing with his application.
31. Document 8 clearly refers to "*notes or photographs of the offence*". Although the agency found no such documents as a result of its original searches, further inquiries with the Rangers Department on external review resulted in those photographs being found on the Enforce-IT system.
32. In response to my office's inquiries as to why those photographs were not initially identified, the agency stated:

"The Records Department does not have access to the Enforce IT system and as such relies on other Departments to provide the required information and documents. An email dated the 1 July 2009 was circulated to various officers of various departments at the Town of Claremont, providing notification of the FOI Application being received. Questions were raised regarding availability of any documents."
33. 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 that 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.

34. I understand that the agency has now taken steps to ensure that correspondence marked as 'private' or 'personal' is recorded as having been received at the agency before it is distributed to the addressee so that, in future, it will be possible to verify both the receipt of the correspondence and the name of the addressee. Those instructions now appear on p.5 of the agency's "*Records Management Procedure Manual and User Responsibilities*" and I understand that this will assist future searches for correspondence.
35. 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. Although no record-keeping system is infallible, it is incumbent on agencies to ensure that recordkeeping is the responsibility of all staff members. The loss of public records is inconsistent with the requirements of the *State Records Act 2000* and undermines the principle of public accountability and the objects of the FOI Act, which include making State and local government agencies more accountable to the public (s.3(1)(b)): see *Re Anderson and Water Corporation* [2004] WAICmr 22 at [28].
36. I consider that the general right of access to State and local government documents created by the FOI Act is undermined if agencies' processes and searches are not sufficient to enable them to locate documents in their possession. In the present case, documents were overlooked because they were misidentified and, particularly in the case of Document 8, not read with sufficient attention. Proper searches of the agency's Enforce IT system should have identified the photographs of the complainant's car in the course of the agency's dealing with his access application.
37. In my view, there are reasonable grounds to believe that the First Letter, the remittance advice slip and the payment methods slip exist or should exist and are or should be held by the agency. The next question for my determination is whether the agency has now taken all reasonable steps to find the documents described by the complainant in his access application.
38. In light of the searches and inquiries that the agency has now made in response to queries from the complainant and from my office - as detailed in paragraphs 21-27 - I am satisfied that the agency has now taken all reasonable steps to find the requested documents, as required by s.26 of the FOI Act and that those documents are either in the agency's possession but cannot be found, or do not exist. Accordingly, I confirm the agency's decision to refuse access under section 26 of the FOI Act.
