

JONES AND LOCAL GOVT

OFFICE OF THE INFORMATION COMMISSIONER (WA)

Decision summary issued pursuant to s.76(8) of the *Freedom of Information Act 1992*

COMPLAINT No: 97117

DECISION No: D02497

PARTIES: Edith Winifred Jones

Complainant

Department of Local Government

Respondent

No. of documents in dispute: Not applicable

Exemption clause(s) : Not applicable

In October 1996, as a result of an access application under the *Freedom of Information Act 1992* ('the FOI Act') made to the Department of Local Government ('the agency'), Mrs Jones ('the complainant') was granted access to four file notes held by the agency. By letter dated 12 December 1996, the complainant made a further application to the agency seeking access to certain documents including any responses to the four file notes to which access had already been given.

In the months after receiving the access application, the agency dealt with the complainant on a number of occasions in an endeavour to satisfy her various requests for access to documents. In a notice of decision dated 28 May 1997, the agency informed the complainant that only one document could be found and a copy of that document was provided to the complainant. The agency further informed the complainant that it could not locate any of the other documents referred to in the access application, because one did not exist and insufficient information to enable the agency to identify the others had been given by the complainant. Pursuant to s.26 of the FOI Act, the sending of such a notice is regarded as a decision to refuse access.

The complainant sought internal review of that decision. The internal reviewer confirmed the decision on the basis that the documents either did not exist or could not be found and refused access to one other document on the basis that it was the subject of another complaint then before the Information Commissioner.

On 29 June 1997, the complainant lodged a complaint with the Information commissioner seeking external review of the agency's decision in so far as it related to documents to which access had not been given on the basis that they either cannot be found or do not exist.

Review by the Information Commissioner

In dealing with this complaint, I sought and obtained a copy of the agency's FOI file maintained in respect of this matter, together with further information from the agency in respect of the searches conducted by it to locate the requested documents.

I informed the parties in writing of the result of my inquiries and my preliminary view of the complaint, including my reasons. I also explained to the complainant the manner in which I deal with complaints that concern a refusal of access in accordance with s.26 of the FOI Act, and the matters about which I must be satisfied in determining whether the refusal of access is justified. Based on the information before me, it was my preliminary view that the requested documents may not exist in the agency and the agency had taken all reasonable steps to locate those documents. Therefore, I did not consider it necessary for the agency to conduct any further searches.

The complainant was given the opportunity to respond. Although the complainant provided a further submission for my consideration, she did not provide any submission of substance to assist me in my deliberations. Accordingly, I

am not dissuaded from my preliminary view of this complaint that the requested documents either do not exist or cannot be found. A summary of my reasons follows.

Documents that do not exist or cannot be found

Section 26 of the FOI Act deals with the requirements of an agency in circumstances where it is unable to locate the documents sought by an access applicant. Section 26 provides that an agency may advise an applicant in writing that it is not possible to give access to a document if all reasonable steps have been taken to find the document and the agency is satisfied that the document is in its possession, but cannot be found or it does not exist. For the purposes of the FOI Act, the sending of such notice is to be regarded as a decision to refuse access to the document, and on external review or an appeal under Part 4 of the FOI Act, the agency may be required to conduct further searches for the document.

I have discussed my view of the requirements of s.26 in previous decisions concerning documents that cannot be found. I remain of the view that, when dealing with such an issue, there are two questions which must be answered. The first question is whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. In circumstances where the first question is answered in the affirmative, the next question, in my view, is whether the agency has taken all reasonable steps to find those documents.

As I have said before, I do not consider it is my function to physically search for the requested documents on behalf of the 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 the agency in a particular instance, and to require further searches if necessary.

The existence of the documents

I have considered the contents of the four file notes to which access has already been granted. There is nothing in those documents that suggests to me that additional documents should exist. The file notes are merely routine internal correspondence between officers of the agency that would not necessarily provoke or warrant a written response. For example, one file note records the initials of another officer of the agency and the date on which it was noted by that officer. Clearly, nothing further needed to be done in respect of that particular file note.

The other documents sought were described in the access application as “[a]ny other assessments/reviews of [a particular inquiry]” and “[d]raft case supporting [a particular matter]”. There is no evidence before me that any such documents exist or should exist, or even existed or should have existed. Accordingly, I am not satisfied that the documents referred to by the complainant actually exist or should exist in the agency.

Inquiries have established that at least one officer of the agency has consistently dealt with the complainant in relation to various matters about which she has contacted the agency since 1989. That person is familiar with the documents held and generated by the agency in respect of the particular matters which have been of concern to the complainant. I am informed by that officer that the relevant documents are held on two files comprising 13 volumes in total. That officer also informs my office that he has personally examined each volume of files in an attempt to locate the requested documents, without success. I am informed by the agency that no other file series is likely to contain documents which deal with this particular subject matter. In any event, I am satisfied that, in the circumstances, the agency has taken all reasonable steps to locate the documents. There is nothing before me to warrant my requiring further searches be conducted by the agency.

Therefore, for the reasons given to the parties, which I have summarised above, I confirm the decision of the agency to refuse access to the documents on the ground either that they do not exist or cannot be found.

B. KEIGHLEY-GERARDY

INFORMATION COMMISSIONER

9 September 1997