

BARRETT AND POLICE

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

**File Ref: 95122
Decision Ref: D03295**

Participants:

Tracey Marie Barrett
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents recording or relating to a complaint to police - section 26 - documents either in the possession of the agency but cannot be found or do not exist - sufficiency of search - whether agency has taken reasonable steps to find documents - role of the Information Commissioner.

Freedom of Information Act 1992 (WA) s. 26.

Re Uren and Ministry for Planning (Information Commissioner, WA, 12 July 1995, unreported).

Re Doohan and Western Australia Police Force (Information Commissioner, WA, 5 August 1994, unreported).

Re Oset and Ministry of the Premier and Cabinet (Information Commissioner, WA, 2 September 1994, unreported).

Re Lithgo and City of Perth (Information Commissioner, WA, 3 January 1995, unreported).

Re Tickner and Police Force of Western Australia (Information Commissioner, WA, 7 March 1995, unreported).

Re Nazaroff, Nazaroff and Nazaroff and Department of Conservation and Land Management (Information Commissioner, WA, 24 March 1995, unreported).

Re Goodger and Armadale Kelmscott Memorial Hospital (Information Commissioner, WA, 9 May 1995, unreported).

Re Oset and Health Department of Western Australia (Information Commissioner, WA, 1 June 1995, unreported).

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

DECISION

The decision of the Police Force of Western Australia to refuse access to documents, on the ground that those documents do not exist, is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12th September 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia ('the agency'), to refuse Mrs Barrett ('the complainant') access to documents requested under the *Freedom of Information Act 1992* ('the FOI Act'). Access was refused on the basis that the requested documents do not exist. The complaint therefore, concerns the adequacy of the searches conducted by the agency to locate the requested documents.
2. On 31 March 1995, the complainant received a telephone call from Sergeant Kaplin, of the Rockingham Traffic Office of the agency. The material before me indicates that Sergeant Kaplin had called upon the complainant earlier that day but found she was not at home. Therefore, he had left a calling card requesting the complainant to call him. Thereafter, the complainant telephoned the Rockingham Traffic Office, but Sergeant Kaplin was unable to speak to her. However, Sergeant Kaplin telephoned the complainant later that day and informed her of the substance of a complaint that had been received by him at the Rockingham Traffic Office that day, concerning the manner in which she had been driving her vehicle in Safety Bay the previous day. The complainant denied the substance of the matters complained of against her. Sergeant Kaplin gave the complainant an informal warning and determined that no further action would be taken.
3. Later that same day, and after receiving the warning from Sergeant Kaplin, the complainant lodged an access application under the FOI Act seeking access to documents and records of the agency relating to the complaint received by the police which resulted in the visit by Sergeant Kaplin to her residence and the subsequent telephone discussion with Sergeant Kaplin.
4. After discussions between officers of the Freedom of Information Unit of the agency and the complainant, following receipt of her access application, the complainant confirmed that she was seeking access to personal information about her and that she was not seeking access to personal information about third parties, nor was she seeking access to information that would identify the person or persons who made the complaint at the Rockingham Traffic Office in the first instance.
5. On 30 May 1995, Chief Inspector Rae, Manager of the agency's FOI Unit, released copies of two documents to the complainant with personal information about third parties deleted from those documents. However, the copies of the documents provided to the complainant were illegible and, on 8 June 1995, the complainant requested the agency provide her with typed copies of those documents. The agency did so. The complainant also sought additional information from the Chief Inspector about the information recorded in the

documents to which access had been provided. At the same time, in a letter addressed to Sergeant Kaplin, the complainant sought his advice about and explanation of certain matters discussed during their telephone conversation on 31 March 1995.

6. On 27 June 1995, following an exchange of correspondence between Chief Inspector Rae and the complainant, the complainant informed the agency that she believed at least one other document existed in the agency which had not been disclosed to her and she again requested the agency to provide additional information to her about the contents of the documents. The agency treated the complainant's letter of 27 June 1995 as a request for internal review. On 29 June 1995, Acting Commander Hawkes informed the complainant that he had completed the internal review and that the initial decision was confirmed. Acting Commander Hawkes further informed the complainant that the information requested by way of explanation was outside the ambit of her access application. The agency declined to deal with the matter any further.
7. Acting Commander Hawkes' decision on internal review effectively denied the complainant access to certain documents on the ground that those documents do not exist. However, all other documents which had been located and identified as being within the scope of the access application were released to the complainant. On 6 July 1995, the complainant applied to the Information Commissioner for external review.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following receipt of this complaint, a member of my staff met with the complainant and her husband in an attempt to conciliate this matter. At that meeting, the complainant and her husband explained the basis for their beliefs that additional documents existed. The complainant claims that her husband saw a document in the possession of Sergeant Kaplin when he attended the complainant's home which comes within the ambit of her access application and which has not been released to her. The complainant further claimed that Sergeant Kaplin knew a substantial amount of personal information about her which he revealed to her during their telephone discussion. It is her belief that that information could only have come from the person or persons who made the complaint to the Rockingham Traffic Office and that Sergeant Kaplin must have recorded those details in another document.
9. In my view, Acting Commander Hawkes' letter to the complainant, dated 29 June 1995, is to be regarded, in part, as a notice pursuant to s.26(1) of the FOI Act. On that basis, I accepted the complaint as a complaint against a decision of the agency to refuse access to the requested documents. The question for my determination is whether the decision of the agency to refuse access, on the basis that the documents either do not exist or that they exist but cannot be found, was justified.

10. Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate the documents sought by an access applicant. That section provides as follows:

"26. (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."

11. Following the preliminary conference with the complainant, the agency was requested to conduct further searches. Those further searches were conducted at the Rockingham Traffic Office by Sergeant Kaplin, to no avail. In addition, on 1 August 1995, a member of my staff attended at the Rockingham Traffic Office, accompanied by an officer of the agency's FOI Unit.
12. The purpose of that visit was to inspect the record management system and document storage facilities at Rockingham Traffic Office, in order to be satisfied that the agency had taken all reasonable steps to identify and locate documents that came within the ambit of the complainant's access application.
13. During that visit, the member of my staff was informed about the procedures employed by the agency for dealing with counter complaints. As a result, I am informed that a counter complaint is recorded when a member of the public attends at the front counter of the Traffic Office to make a complaint about, among other things, an alleged traffic offence or an alleged infringement of the road traffic code: Brief details of the complaint are recorded: An officer inquires into the complaint, usually by speaking to the alleged offender: Depending on the nature of the complaint and the explanation received, the complaint is finalised and the original documents are filed at the Traffic Office in a two-ring binder. An examination of those binders inspected by the member of my staff did not disclose any other documents relevant to the complainant's access application.

14. The member of my staff was also informed that each police officer is required to complete a record of his or her duties on "Daily Contact Return and Occurrence" sheets. The record of duties submitted by Sergeant Kaplin for 31 March 1995 was examined. That document recorded that he had attended to a counter complaint between 9.50am and 10.30 am that day. It appeared to my staff member that that document was within the ambit of the complainant's access application. The agency subsequently provided the complainant with access to an edited copy of that document.
15. Sergeant Kaplin told my officer that he made no other notes of the conversation with the person lodging the counter complaint, other than what had been recorded on the official record. He further explained that it is normal police procedure to spend a minimal amount of time on such matters, given the minor nature of the complaints usually made at the counter.
16. On the basis of the information provided to me by my officer following that visit to the Rockingham Traffic Office, I formed the preliminary view that the agency had complied with its obligations under the FOI Act and that no further documents exist that are within the ambit of the complainant's access application. That view was conveyed to the complainant on 11 August 1995. In addition, the complainant was informed of the extent of the inquiries conducted by my office and of the manner in which the agency creates and maintains relevant records of such matters.
17. On 17 August 1995, I received a further submission from the complainant in which she reiterated her belief that additional documents exist in the agency. However, no further information going to establishing that further documents do or should exist was provided.

Documents that cannot be found or do not exist

18. On a number of occasions when dealing with complaints about access to documents under the FOI Act, and most recently in my decision in *Re Uren and Ministry for Planning* (12 July 1995, unreported), I have considered allegations about missing documents: see also *Re Doohan and Western Australia Police Force* (5 August 1994, unreported); *Re Oset and Ministry of the Premier and Cabinet* (2 September 1994, unreported); *Re Lithgo and City of Perth* (3 January 1995, unreported); *Re Tickner and Police Force of Western Australia* (7 March 1995, unreported); *Re Nazaroff, Nazaroff and Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported); *Re Goodger and Armadale Kelmscott Memorial Hospital* (9 May 1995, unreported); *Re Oset and Health Department of Western Australia* (1 June 1995, unreported).
19. In those decisions I have discussed the function of the Information Commissioner when dealing with complaints that concern documents allegedly missing from an agency's record-keeping system. I repeat my view of that function which is, in my opinion, of necessity, limited. The function of the Information Commissioner, when reviewing a complaint involving a denial of access on the

ground that requested documents either do not exist or cannot be located, is limited, in my view, to inquiring into the adequacy of the searches conducted by the agency.

20. I do not consider it is my function to physically search for the documents on behalf of a complainant, nor to examine in detail an agency's record-keeping system. However, if I am not satisfied that the searches undertaken have been adequate, I shall exercise my power, under s.26(2) of the FOI Act, to require an agency to conduct further searches in an effort to locate documents. On this occasion, as I have said, further searches were required of the agency and an on-site inspection of the record system was conducted by a member of my staff.
21. As I have said before, the adequacy of efforts made by an agency to locate documents the subject of an FOI access application are to be judged by having regard to what was reasonable in the circumstances: *Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* (1985) 8 ALD 163, at 170. In this instance, I accept the agency's explanation that a minimum amount of effort is spent on counter complaints of a minor nature and that that includes the creation of minimal records for the purpose of dealing with such complaints. In this instance, I am satisfied that the agency has taken all reasonable steps to locate the requested documents and that nothing more could be done in order to satisfy the complainant. I am also satisfied that the agency's record-keeping procedures in respect of such matters were adhered to by Sergeant Kaplin.
22. In my view, the complainant has been adequately informed of the procedures employed by the agency and the reasons why no further documents can be found which are within the ambit of her access application. I am also satisfied that the documents which the complainant genuinely believes must exist, do not exist and never did.
