

SHARP AND POLICE

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

**File Ref: 95118
Decision Ref: D04795**

Participants:

Jacob Sharp
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 - destruction of documents.

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

Library Board of Western Australia Act 1951 s.30.

Re Barrett and Police Force of Western Australia (Information Commissioner, WA, 12 September 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 Uren and Ministry for Planning (Information Commissioner, WA, 12 July 1995, unreported).

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

DECISION

The decision of 22 June 1995 of the Police Force of Western Australia to refuse access to the requested documents on the ground that those documents either do not exist or cannot be found, is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th October 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 Mr Sharp ('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 22 March 1995, the complainant lodged an access application under the FOI Act with the agency requesting access to "...all information relating to the case of fraud & forgery perpetrated against me in Jan 1980...". The complainant particularised his request by identifying the parties involved in his original complaint to the agency and by reference to officers of the agency involved in the investigation of his complaint until July 1983 when the inquiry was closed.
3. On 6 June 1995, Chief Inspector M J B Rae, Manager of the agency's FOI Unit, conveyed to the complainant the agency's decision on access. The decision of Chief Inspector Rae was to refuse access to the requested documents because, after conducting a reasonable search the documents could not be found. Chief Inspector Rae informed the complainant that searches had been conducted with the agency's Chief Office Records, CIB Support Services (Records) and with two of the officers named by the complainant in his access application, being the now Assistant Commissioner (Crime Operations) and a current member of the Fraud Squad.
4. On 20 June 1995, the complainant sought internal review of the agency's decision. By letter dated 22 June 1995, Acting Commander Hawkes confirmed the initial decision of the agency. Acting Commander Hawkes also informed the complainant that his letter was to be regarded as a notice under s.26(1) of the FOI Act. On 4 July 1995, the complainant applied to the Information Commissioner for external review of the agency's decision because he remained dissatisfied with the agency's claims that documents related to his access application either cannot be found or do not exist.

ACTION BY THE INFORMATION COMMISSIONER

5. Pursuant to s.26(1) of the FOI Act, an agency may advise an applicant, by written notice, 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 either is in the agency's possession but cannot be found, or does not exist. Section 26(2) of the FOI Act provides that the sending of such a notice is to be regarded as a decision to refuse access to the document.

6. On that basis, on 11 July 1995, I accepted the complaint as a complaint against a decision of the agency to refuse access to the requested documents. However, 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 cannot be found, was justified. For the purpose of my dealing with this matter, therefore, two questions must be answered. Firstly, are there reasonable grounds to believe that the requested documents exist? Secondly, when the first question is answered in the affirmative, were the searches conducted by the agency reasonable in the circumstances?
7. 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."

Are there reasonable grounds to believe the requested documents exist?

8. According to the complainant, in 1980 he attended at Police Headquarters where he spoke to a member of the Fraud Squad and made a complaint about a particular company and a finance contract he had with that company. Over a period of time the complainant alleges that he made a number of statements to the investigating detectives and he understood that his complaint was one of a number of matters about the particular company, and other individuals associated with related companies, that were the subject of inquiries by the Fraud Squad at that time. However, the complainant informed my office that he did not receive any official correspondence from the agency and, to the best of his knowledge, the investigations were fruitless and no charges were preferred against any person.

9. During the course of my dealing with this complaint, the agency found an additional document which was made available to the complainant. That document is a computer record of a Supplementary Offence Report which was found under an old filing system no longer in use in the agency. The Supplementary Offence Report indicates that an original Offence Report for the matter complained about by the complainant, was completed and that the Fraud Squad of the agency held the relevant documents relating to that complaint.
10. Based on that information and the precise details provided by the complainant, I am satisfied that there are reasonable grounds to believe that the requested documents were in existence in the agency, at least in 1983.

Were the searches conducted by the agency reasonable?

11. As I have said before, the adequacy of efforts made by an agency to locate documents the subject of an FOI access application is 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. Initially, the agency provided the complainant with some details of the searches it had conducted. Subsequently, further inquiries were made by a member of my staff with the agency's FOI Unit and, as a result of those inquiries, the agency conducted further searches of its records in an attempt to locate the disputed documents.
12. As the result of the inquiries by my officer, Superintendent Carroll of the agency's Crime Support Services also informed me that additional searches had been conducted in his area of the agency and also with the Fraud Squad. Those additional searches located the Supplementary Offence Report referred to in paragraph 9 above.
13. Superintendent Carroll provided my office with a copy of the current Criminal Investigation Branch Records - Record Retention and Disposal Schedule, which came into operation in 1987, and the previous Schedule dated 2 August 1976. The current Schedule authorises the agency to destroy records in accordance with the *Library Board of Western Australia Act 1951*.
14. Sub-sections 30(2) and (3) of the *Library Board of Western Australia Act 1951* provide as follows:
 - (2) *The officer in charge of a public office may destroy or dispose of any public record or class or public records in the custody or under the control of that public office -*
 - (a) *if the destruction or disposal is in accordance with a Retention and Disposal Schedule with the terms of which an authorised officer of the Board has concurred; or*

(b) if the Board has informed that officer in writing that it does not require that public record or that class of public records to be transferred to the Board for inclusion among the State archives,

but not otherwise.

(3) Before any public records are destroyed or disposed of, the officer in charge of the public office in the custody or under the control of which the public records are shall notify the Board of the intention to destroy or dispose of those public records and in that notification shall specify the nature of the public records concerned."

15. The agency's Schedules both contain similar instructions in respect of paper based records concerning major crime files. The agency defines a "major crime" as one that may be prosecuted in either the District or Supreme Courts of Western Australia. Documents relating to fraud matters with a value of \$100,000 and over are considered a "major crime" and those files are retained in the main system for 7 years. After 7 years major crime files are removed from the main system and stored separately in a crime category sequence for a further 18 years. After 18 years the records are reviewed by the agency, in conjunction with Archives staff, and documents considered to be of historical significance are retained in the State Archives. The remainder are considered on a case by case basis and either retained or destroyed.
16. The Supplementary Offence Report is the only document located by the agency in its secondary storage system that is within the ambit of the complainant's access application. That document does not record a nominated value for the alleged offence to which it relates. On the basis of the information contained in the Supplementary Offence Report the agency submits that it is sufficient evidence to support the view that the original file held by the agency in this matter was destroyed in or around 1990.
17. Based on the material before me, I formed the preliminary view that the searches conducted by the agency were, in all the circumstances, reasonable. The complainant was provided with my preliminary view and the additional information and copies of the Schedules received from Superintendent Carroll. Notwithstanding my preliminary view, the complainant remained of the view that, in his opinion, the value of the alleged fraud that was the subject of his complaint exceeded \$100,000. Therefore, on the basis of the agency's own records, he was of the view that the relevant documents should still exist in the agency.
18. That proposition is not altogether, unreasonable. However, from my examination of the Supplementary Offence Report it appears to me that the "value" of the fraud alleged by the complainant either was not recorded in the original Offence Report or alternatively, after inquiry, the alleged offence was not one involving fraudulent conduct as believed by the complainant. There is no evidence before me to support the complainant's view of the seriousness of his

complaint in 1980 to the agency, nor to support his belief that relevant documents should still exist in the agency.

Documents that cannot be found or do not exist

19. 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 Barrett and Police Force of Western Australia* (12 September 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); and *Re Uren and Ministry for Planning* (12 July 1995, unreported).
20. In those decisions I have discussed the function of the Information Commissioner when dealing with complaints about access to documents that should exist but which cannot be found. 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 to inquiring into the adequacy of the searches conducted by the agency.
21. 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.
22. In *Re Doohan* I considered 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; and
 - non-existence.
23. However, if an agency is unable to locate requested documents an adequate statement of reasons may go some way towards reassuring a sceptical applicant. In my view, the minimum requirement is a brief explanation of the steps taken by the agency to satisfy the request. I am satisfied, in this instance, that the complainant has been adequately informed of the nature and extent of searches conducted by the agency. I am also satisfied that those searches have been, in all

the circumstances, reasonable and that the agency's explanation that the documents have been lawfully destroyed, is the most likely explanation for the fact that the documents cannot be found.

24. Therefore, I find that, although the requested documents existed at one time in the agency, they either no longer exist or cannot be found. Accordingly, I confirm the agency's decision to refuse access to those documents.
