

**PAVER AND ALBANY**

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

**File Ref: 96114  
Decision Ref: D06096**

Participants:

**Roland George Lyall Paver**  
Complainant

- and -

**Town of Albany**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents re decision to instruct legal advisers - documents re alleged involvement of agency in termination of employment contract - access refused because documents do not exist - section 26 - whether reasonable grounds to believe that documents exist or should exist - sufficiency of searches.

*Freedom of Information Act 1992 (WA)* ss. 26, 97; Schedule 1 clause 7.

*Re Boland and City of Melville* (Acting Information Commissioner, WA, 11 October 1996, unreported, D05396).

## **DECISION**

The decision of the agency 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**

14th November 1996

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Town of Albany ('the agency') to refuse Mr Paver ('the complainant') access to various documents sought by the complainant pursuant to the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. It is my understanding that, during 1991, the complainant was employed by the Albany Tourist Bureau ('the Bureau'). I also understand that at that time, the Bureau was not a part of the agency, although it did receive some funding from the agency. In August 1991, the complainant's contract with the Bureau was terminated, and the complainant received a payment from the Bureau as a result of that termination. Subsequently, the complainant raised a number of matters with the agency and the agency requested its legal advisers to deal directly with the complainant with respect to those matters.
3. On 20 May 1996, the complainant applied to the agency under the FOI Act for access to certain documents. The agency asked the complainant to clarify the ambit of his access application and, on 27 May 1996, the complainant informed the agency that he was seeking access to documents relating to three particular matters. Firstly, he was seeking access to documents related to a particular conversation he had had with the Chief Executive Officer of the agency, including the instructions given by the agency to its solicitors to investigate and advise the agency in relation to his complaints. Secondly, he sought access to documents relating to the awarding of a contract concerning the management of the Town Hall Theatre. Thirdly, he was seeking access to documents related to the role played by the agency in the termination of his employment contract with the Bureau, including documents concerning the appointment of two councillors to the Bureau Board, documents concerning certain meetings held prior to his termination, documents recording the payment of money to the Bureau, and documents recording telephone conversations in relation to his termination.
4. The agency identified a number of documents which were within the ambit of the first part of the complainant's access application. In accordance with a notice of decision dated 27 June 1996, access was granted to a number of those documents. However, access to the correspondence between the agency and its legal advisers was refused on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. Two documents relevant to the second matter were identified and access to those documents was granted. With respect to the third matter, the agency gave the complainant access to a document concerning the appointment of the two councillors, and informed the complainant that it was not involved with the termination of his employment with the Bureau and, therefore, did not hold any documents of the type requested. Accordingly, access was refused on the ground that the requested documents do not exist.

5. On 4 July 1996, the complainant sought internal review of the agency's decision and, by way of explanation, referred to specific documents which he considered to be in existence and within the ambit of the third part of his access application. On 15 July 1996, the agency confirmed its initial decision and informed the complainant that the additional documents specified by him in his request for internal review were outside the ambit of his initial access application. Accordingly, the agency declined to deal with the question of access to those particular documents.
6. On 30 July 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the decision of the agency with respect to the agency's decision concerning the documents relating to the instructions to the legal advisers and documents relating to the termination of his employment with the Bureau.

### **REVIEW BY THE INFORMATION COMMISSIONER**

7. On 6 August 1996, I notified the agency that I had received a complaint against its decision and, pursuant to my powers under the FOI Act, I obtained the documents in dispute, together with the file maintained by the agency in respect of this matter, and the documents held by the agency which were identified as being those sought by the complainant in his request for internal review.
8. The complainant confirmed that he is seeking access to records relating to the decision of the agency to instruct its legal advisers to act on its behalf, but he is not seeking access to copies of the communications and correspondence between the agency and its solicitors. Therefore, I have not considered those documents further as part of this complaint. In any event, I am satisfied that documents of that type would be exempt under clause 7.
9. After examining the material before me, on 14 October 1996, I informed the parties in writing of my preliminary view of this complaint, and my reasons for that view. With respect to the first aspect of the complaint (documents relating to the agency's instruction to its solicitors), bearing in mind that the complainant does not seek access to documents which are communications between the agency and its solicitors, it was my preliminary view that all reasonable steps had been taken by the agency to locate such documents, and that such documents do not exist.
10. With respect to the second aspect of the complaint (documents relating to the involvement of the agency in the termination of the complainant's contract of employment with the Bureau), it was my preliminary view that the agency had taken all reasonable steps to locate documents of the kind requested but none could be located. I was also of the preliminary view that the agency was justified in determining that the documents specified by the complainant in his application for internal review were not within the ambit of the access application.

11. Notwithstanding that preliminary view, the agency granted the complainant access to additional documents. However, following his consideration of my preliminary view and the additional documents provided to him, the complainant decided to pursue his complaint with respect to those two aspects of the agency's decision.
12. The matter for my determination in respect of both aspects of the complaint is whether the agency was justified in refusing access to the requested documents on the ground that those documents either do not exist or cannot be found. That question requires a consideration of the sufficiency of the searches conducted by the agency.

### **SUFFICIENCY OF SEARCH**

13. 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:

***“Documents that cannot be found or do not exist***

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.”*

14. As I have discussed in previous decisions dealing with the question of the sufficiency of the agency's search for documents, most recently in the decision of the Acting Information Commissioner in *Re Boland and City of Melville* (11 October 1996, unreported, D05396), if a complainant raises the issue of the existence of additional documents which have not been identified by the agency, in my view, there are two questions which are required to be answered. The first question to be answered 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 the documents and is satisfied that they are in the agency's possession but cannot be found or that they do not exist.

15. I do not consider that it is my function in reviewing a decision made by an agency in accordance with s.26 to physically search for the requested documents on behalf of the complainant. I take the view that, provided I am satisfied that the requested documents exist, or should exist, within the agency, it is my responsibility to inquire into the adequacy of the searches conducted by the agency and to require further searches if necessary in order to satisfy me that the agency has acted in accordance with its obligations under the FOI Act, but that the documents cannot be found. In this case, I consider that, in determining the answer to the first question, it is relevant to consider the scope of the access application as interpreted by the agency, especially as the complainant takes a differing view on that point.

**Documents relating to the decision to instruct the legal advisers.**

**(a) Do the documents exist or should they exist?**

16. The complainant informed my office that he is seeking access to documents of the agency which record the decision of the agency to instruct its solicitors to deal with him and his complaints. It appears that the complainant is of the view that the decision to instruct legal advisers is a decision that was, or should have been, made at a full council meeting of the agency. It is the submission of the complainant that if that decision were made by the full council, then documents should exist which record such procedural matters as the date and place of the meeting; the councillors present; those persons who proposed and seconded the motion to instruct the legal advisers; those councillors who opposed the motion; and whether the General Manager/Town Clerk of the agency had previously given similar instructions to the legal advisers and, if so, on how many occasions.
17. I am informed by the General Manager/Town Clerk of the agency that the decision to instruct legal advisers to act on behalf of the agency in this matter was an administrative decision made by him in the ordinary course of the performance of his functions as the General Manager/Town Clerk of the agency. I am further informed by the General Manager/Town Clerk that the instructions to act in that manner were contained in a letter sent by him to the legal firm. Accordingly, the General Manager/Town Clerk confirms that the decision was not made at a full council meeting, nor was it made in the manner suggested by the complainant.
18. The agency also informs me that a physical search was made of all of the files held in the agency relating to the complainant, and of the general legal files. The agency also searched the minutes of the full council meetings of the agency for the relevant period. However, no further documents of the type sought by the complainant were located.
19. I have examined and considered the 1994 Information Statement for the agency published and submitted to my office in accordance with the provisions of s.97 of the FOI Act. That document describes the functional structure of the agency and

contains a general description of the decision-making powers and responsibilities of various officers of the agency. According to the Information Statement, full Council is the decision-making body responsible for establishing the policies and practices by which the agency operates. The Management group, consisting of the Chief Executive Officer and three Directors, is responsible for implementing the policies and practices established by Council, and for managing the day to day operations of the agency. The Chief Executive Officer of the agency is responsible for the coordination and operation of all functions of the agency, including administration.

20. Further, the agency's Information Statement makes it clear that Council employs professional officers to manage the day to day operation of the agency and to provide advice and direction on policy and practice matters. The procedure for bringing matters before meetings of Council by way of "Business Papers" is outlined on pages 15 and 16. Although the agency's Information Statement does not describe in detail those decisions that should be taken by full Council and those that are within the responsibility of the General Manager/Town Clerk as Chief Executive Officer of the agency, routine administrative matters are clearly within the province of the latter.
21. After considering the material before me provided by the parties, including the relevant correspondence between the agency and its solicitors, the circumstances giving rise to the solicitors being so instructed and the agency's Information Statement, I am not satisfied that the documents sought by the complainant exist or should exist in the agency. It appears to me that the decision taken by the General Manager/Town Clerk was a decision that was within his responsibilities and that it was not necessarily a decision that required a resolution by the full Council.
22. There is no persuasive evidence before me to suggest that the decision was made, and the instructions to the solicitors given, in any way other than that described by the General Manager/Town Clerk and detailed in paragraph 17 above. That account is supported by the documentary evidence before me, in particular, the correspondence between the agency and its solicitors concerning the matter. In any event, I am satisfied that the searches conducted by the agency to locate any documents within the ambit of that part of the access application were, in all the circumstances, reasonable. Accordingly, in respect of those documents, I am of the view that the agency's decision to refuse access on the ground that they either do not exist or cannot be found was justified and in accordance with s.26 of the FOI Act.

### **Documents relating to the complainant's termination of employment with the Bureau**

#### **(b) Do the documents exist or should they exist?**

23. With respect to the second aspect of the complaint, the complainant submits that the agency has not identified all of the documents within the ambit of that part of

- his access application. The complainant's view in this regard appears to be based on the fact that his recollection of the circumstances surrounding the termination of his employment contract with the Bureau differs from the view taken by the agency as to its role in that event.
24. The complainant contends that the specific documents identified in his request for internal review - namely, a cheque delivered to the Bureau by an officer of the agency on 16 August 1991 and documents relating to certain incidents that the complainant alleges occurred around that time, including the payment of a cheque to the Bureau by the agency - reflect some involvement by the agency in the termination of his employment. Therefore, the complainant submits that documents should exist which are within the scope of that part of his access application. However, the complainant acknowledges that, in his application for internal review, he rephrased the terms of his initial access application to omit any direct reference to the role allegedly played by the agency in the termination of his contract, and he focussed instead on obtaining access to documents recording the payment of a sum of money by the agency to the Bureau around the relevant period.
  25. The agency does not dispute the fact that it provided some funding to the Bureau at the relevant time. It appears to me from the material provided to me by the agency that the payment in question was made in response to a request from the Bureau for a cash payment to overcome a funding shortfall. However, the agency does not consider that it had any role in the termination of the complainant's employment contract which it appears occurred around the same time as the payment to the Bureau from the agency. Accordingly, the agency determined that it does not possess any documents which are in any way related to its role in the termination of the complainant's employment with the Bureau simply because the agency had no such role in that process.
  26. From the terms of the complainant's initial access application and the terms of the request for internal review, I consider it was open to the agency to construe the access application as being a request for access to documents detailing the agency's role in the termination of the complainant's contract. In the letter of 27 May 1996 clarifying the terms of his access application, the complainant clearly stated that he sought access to material "*relating to the role played by the [agency] in facilitating the termination of [the complainant's] employment contract*" with the Bureau. Further, the letter went on to state that "[i]n particular, but without limiting the generality of the above..." and specified various documents relating to particular incidents. In my view, this makes it clear that the access application is to be interpreted to mean that the additional categories of documents described by the complainant in the clarification of his initial access application may be included within the ambit, but that, ultimately, the documents to which access is sought relate to the role played by the agency in the incident.
  27. I do not consider it to be apparent on the face of the complainant's initial access application or the clarification letter that what was being sought by the complainant were particular documents relating to factual incidents which



happened within the agency, whether or not those incidents occurred in the course of the agency's involvement, if any, in the termination of the complainant's employment contract with the Bureau. I am satisfied that, if the complainant were seeking access to specific documents held by the agency relating to particular incidents, whether or not the documents reflect the involvement of the agency, if any, in the termination of the complainant's contract, then it was open to the complainant to lodge a request expressly in those terms, to be dealt with by the agency on that basis in accordance with the terms of the FOI Act.

28. The agency provided my office with copies of documents including a request from the Bureau for further funding and the agency's records regarding the payment made by it in response to the Bureau's request. Following discussions with my office and after consideration of my preliminary view, the agency provided copies of those documents to the complainant, although it was under no obligation to do so because in my view those documents were not within the scope of the request made.
29. After considering the material provided to me by the parties, I am not satisfied that any further documents relating to the second aspect of this complaint exist, or should exist in the agency. There is nothing before me which suggests that the agency was involved in any way in the termination of the complainant's employment. The material provided by the complainant to support his claims to the contrary does not persuade me that this was the case. Accordingly, in respect of this part of the complaint, I consider the first question must be answered in the negative.
30. In any event, my office also inquired into the adequacy of the searches conducted by the agency in relation to this part of the complaint. I am informed that physical searches were conducted of the agency's archival files relating to the dealings and correspondence with the Bureau during the years 1990 and 1991; the files kept by the agency relating to the agency's dealings with the complainant; the diaries of the General Manager/Town Clerk from 1990; council minutes for 1990 and 1991; the general legal opinion file maintained by the agency; the agency's general file relating to aged accommodation, and the agency's general FOI file. Those searches did not locate any documents of the type requested, other than the request for funding and the payment made, copies of which have been provided to the complainant outside the FOI process.
31. I am satisfied that the agency has taken all reasonable steps to locate documents within the ambit of the complainant's access application. Further, I am satisfied that the agency does not have any documents in its possession relating to the alleged role of the agency in the termination of the complainant's contract with the Bureau. Accordingly, I am satisfied that the agency has identified all of the documents in its possession which are within the ambit of the complainant's access application and that the complainant has been given access to copies of those documents that are not exempt.

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