



Freedom of Information Newsletter

Number 6 - March 2016

From the Information Commissioner - Explaining searches to an access applicant

An issue that frequently arises in external reviews undertaken by my office is whether an agency has taken all reasonable steps to find a document requested under the FOI Act. In some cases, this is because the agency has failed to provide sufficient information to the access applicant about why the document cannot be found or does not exist.

There can be valid reasons why a document may not exist or cannot be found. The requested document may never have existed. Alternatively, the document may have been quite properly destroyed in accordance with a retention and disposal schedule approved by the State Records Commission. Good record keeping does not require an agency to retain every document in perpetuity.

A person seeking access to a document under the FOI Act should not be expected to have a detailed knowledge of public sector records management requirements, agency structure or business practices. Where an agency claims under section 26 of the FOI Act that a document does not exist or cannot be found, its notice of decision should provide a clear and comprehensive explanation of the steps the agency has taken to find the document and the reasons why the agency is satisfied that the document cannot be found or does not exist.

My office has dealt with matters where an agency has undertaken well considered and comprehensive physical and electronic searches for a requested document, but has not outlined these to the applicant. Once the nature and extent of these searches is explained to the applicant – for example in a conciliation conference held by my office – the applicant is often satisfied that the document cannot be found or does not exist. If this had been done earlier, the need for an internal or external review may not have arisen.

World of FOI – UK Independent Commission on Freedom of Information Report

The Independent Commission on Freedom of Information, established to review the operation of the United Kingdom's *Freedom of Information Act 2000*, submitted its report to the UK Government this month. The Independent Commission was to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and

whether the operation of the Act adequately recognises the need for a 'safe space' for policy development and implementation and frank advice.

The Independent Commission concluded that the UK Act:

is generally working well, and that it has been one of a number of measures that have helped to change the culture of the public sector. It has enhanced openness and transparency. The Commission considers that there is no evidence that the Act needs to be radically altered, or that the right of access to information needs to be restricted.

Information about the report is available at:

<https://www.gov.uk/government/speeches/open-and-transparent-government>

Did you know? – Agencies are not third parties

An agency (as defined in the FOI Act) is not a third party for the purpose of the access provisions of the FOI Act. Agencies do not have an automatic right to be consulted nor do they have rights of review in relation to the decision made by another agency dealing with an access application. While an agency may consult another agency and take its views into consideration, it is the agency dealing with the access application that must make the decision regarding access unless it transfers the application to the other agency pursuant to section 15 of the FOI Act. Transfer of access applications, in part or in full, is limited to the circumstances outlined in section 15.

If the requested documents held by the agency include documents that originated with or were received from an exempt agency, the agency is required to notify the exempt agency of the application: see section 15(8).

Agency news – Dealing with an access application outside of the FOI Act

If an agency proposes to deal with an access application outside of the FOI Act, it cannot simply decide not to deal with the access application without the agreement of the access applicant.

This office consistently encourages agencies to consider disclosure of documents outside of the FOI process unless there is a good reason not to do so: see section 3(3) of the FOI Act. However, if an agency receives a valid access application in circumstances where it is prepared to deal with the request outside of the FOI Act, it should take steps to explain its intention to the applicant and seek their consent to withdraw or suspend dealing with the formal access application. If an applicant maintains that the request for documents be dealt with under the FOI Act, the agency should deal with that request in accordance with the FOI Act.

Recent decisions of the Information Commissioner

Re 'M' and SMHS - Armadale Health Service [2016] WAICmr 5 PDF

The agency's decision to give the complainant indirect access to certain documents under section 28 of the FOI Act was found to be justified. The Commissioner was satisfied that the principal officer of the agency was of the opinion that direct disclosure of the documents to the complainant, which contained information of a psychiatric or medical nature concerning the complainant, may have a substantial adverse effect on

the physical or mental health of the complainant. Under section 28 access is given indirectly to the complainant by making the documents available to a suitably qualified person.

The agency's decision was confirmed.

Re Bowden and Department of Finance [\[2016\] WAICmr 4 PDF](#)

The agency's decision to refuse access to certain matter on the basis that it is exempt under clause 7(1) of Schedule 1 to the FOI Act was justified. The Commissioner was satisfied that the matter would be privileged from production in legal proceedings on the ground of legal professional privilege. In addition, the Commissioner found that the agency's decision to, in effect, refuse access to documents under section 26 was justified. The agency had taken all reasonable steps to find further documents but they could not be found or did not exist.

The agency's decision was confirmed.

Re Sideris and City of Joondalup [\[2016\] WAICmr 3 PDF](#)

The access applicant applied for documents concerning the Percy Doyle Reserve. The Commissioner was satisfied that the agency's decision to refuse access to certain documents as outside the scope of the amended application was justified. In addition, the Commissioner found that the agency's decision to refuse access to documents under section 26 of the FOI Act, on the basis that they could not be found or did not exist, was justified.

The agency's decision was confirmed.

Re Dacey and Western Australia Police [\[2016\] WAICmr 2 PDF](#)

The access applicant applied for documents relating to a report of an incident that he said he made to the agency in the 1990s. The Commissioner found that the agency's decision to, in effect, refuse access to the documents under section 26 on the basis that they either cannot be found or do not exist was justified. The Commissioner was satisfied that the agency had taken all reasonable steps to find the requested documents but those documents cannot be found or do not exist.

The agency's decision was confirmed.

Re Papalia and Western Australia Police [\[2016\] WAICmr 1 PDF](#)

CCTV footage of an incident outside a business premises was found to be exempt under clause 3(1). The Commissioner was satisfied that the footage would, if disclosed, reveal personal information, as defined in the FOI Act, about individuals other than the complainant. In this particular instance, the Commissioner was satisfied the public interest in ensuring community confidence in the manner in which the agency conducts investigations had been largely satisfied by the access given to the footage by way of inspection outside of the FOI Act. The Commissioner also considered that it was not practicable for the agency to edit the footage pursuant to section 24 of the FOI Act, to delete the exempt information.

The agency's decision was confirmed.

FOI training news

Upcoming training dates for agencies can be found [<HERE>](#). If a session is listed as full, please register for the waitlist. This will give us the opportunity to contact you if there are cancellations or, if there is considerable demand, to schedule another training session.

The **FOI Coordinators Workshop** introduces participants to the objects and principles of the FOI Act and the major features of the legislation. Topics include the role of decision-makers; FOI applications; exemptions; consultation with third parties; charges; notices of decision and review; amendment of records; publication of information; statistics and reporting.

The **Decision Writing Workshop** is designed to enhance decision-makers' skills and confidence in writing a notice of decision that complies with the *Freedom of Information Act 1992* (WA). Participants will be expected to already have a basic understanding of the requirements of the FOI Act.

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