



Documents that cannot be found or do not exist

External review guide for access applicants

Overview

The *Freedom of Information Act 1992 WA* (**the FOI Act**) gives the public a right to access documents of an agency, subject to some limitations which allow the agency to refuse access.^[1] One situation when an agency can refuse access is if the document cannot be found or does not exist. This is set out in section 26 of the FOI Act.

This issue may also be raised if you believe the agency has not conducted reasonable searches to find the documents you asked for.

When does section 26 allow an agency to refuse access to a document?

Section 26(1) of the FOI Act allows an agency to refuse access if:

- The document requested did or does exist but cannot be found (for example, where a document is lost or has been destroyed under a retention and disposal schedule approved under the *State Records Act 2000* (WA)).
- The document requested in the access application does not exist (for example, because it was never created).

If, after internal review,^[2] you believe a document exists and the agency has not conducted reasonable searches to find it, you can apply to the Information Commissioner (**the Commissioner**) to review the agency's decision to refuse you access.

What will the Commissioner do on external review?

The Commissioner will assess whether there are reasonable grounds to believe that the requested document exists or should exist and is, or should be, held by the agency. If reasonable grounds exist, the Commissioner will make inquiries with the agency to assess whether it has taken all reasonable steps to find the documents.^[3] The Commissioner may also require the agency to conduct further searches for documents.^[4] The Commissioner does not physically conduct the searches.

What are 'all reasonable steps' is assessed on a case by case basis. On external review, the Commissioner will usually ask the agency to provide specific information about the record keeping systems it uses and the searches it conducted.

^[1] Section 10 of the FOI Act

^[2] Unless internal review is not available.

^[3] Agencies are required to take all reasonable steps to find the requested documents, not every possible step.

^[4] Section 26(2) of the FOI Act

In some cases, poor record keeping, misfiling or inadequate training in records management may mean an agency cannot find a document that does or did exist. In those situations, the Commissioner may draw to the agency's attention any identified deficiencies in its recordkeeping practices. However, if the Commissioner is satisfied that the agency has taken all reasonable steps to find the document, there is nothing further the Commissioner is required to do on external review.

In cases where the Commissioner is satisfied that there are no reasonable grounds to believe that the document exists or should exist, the Commissioner may not make further inquiries with the agency about the adequacy of its searches. You will be advised of this and given the opportunity to provide further information to the Commissioner before the matter is finalised.

What will the Commissioner ask for on external review?

The Commissioner may ask you to provide information about the document you claim exists, why you believe it exists, and why you consider the agency has not conducted adequate searches for the document.

This information will help the Commissioner make appropriate enquiries and specifically target any additional searches they ask the agency to conduct. General assertions that there must be more documents, without any supporting material, will generally not be enough for the Commissioner to require further searches. Where the Commissioner asks you for more information, you are required to assist with those inquiries. Where you do not cooperate with a reasonable request of the Commissioner, the Commissioner may decide not to continue with the external review.

Does an agency have to create a document?

No, it does not. The FOI Act creates a right of access to existing documents of an agency, not access to information. This means that an agency is not required to create a document to satisfy an access application, where no such document exists. As a result, the Commissioner will only consider the existing documents of an agency when assessing the adequacy of the agency's searches.

Does an agency have to keep every document?

No, it does not. There are specific rules about when documents must be retained, and for how long, and when they can be destroyed. These are set out in the *State Records Act 2000* (WA) and in retention and disposal schedules approved by the State Records Commission.

Retention and disposal schedules set out how long certain records must be retained by agencies and when and how records can be destroyed at the end of the minimum retention period. The Commissioner may consider the relevant retention and disposal schedule if the agency has relied on this to explain why documents cannot be found.

Can I ask for extra documents at external review?

No, you cannot ask for more documents at external review than you applied for originally.

It is not unusual for documents disclosed under an FOI application to raise new issues or suggest that there may be other documents of interest to the applicant. If this happens, you will have to make a new FOI application to the agency; you cannot ask for those extra documents as part of your external review.

This is a general guide to the procedures used by the Commissioner when dealing with external reviews under the FOI Act.^[5]

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^[5] We acknowledge that this publication is partially based on material developed by the Queensland Office of the Information Commissioner. It has been modified to describe the requirements of the FOI Act (WA).