

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

**File Ref: F2004193
Decision Ref: D0192005**

Participants:

Désiré Edgar Michel Mallet
Complainant

- and -

Edith Cowan University
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – section 26 – whether reasonable grounds to believe that a document exists or should exist – sufficiency of searches.

Freedom of Information Act 1992: ss. 26(1), 72(1)(a).

DECISION

The decision of the agency to refuse access under section 26 is confirmed. The agency has taken all reasonable steps to find the requested documents but they cannot be found.

D A WOOKEY
A/INFORMATION COMMISSIONER

7 November 2005

REASONS FOR DECISION

1. This complaint arises from a decision made by Edith Cowan University ('the agency') to refuse Mr Mallet ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In an access application dated 26 July 2004, the complainant applied under the FOI Act for access to documents relating to the decision of the Faculty of Community Services, Education and Social Science, Executive Board of Examiners ('the Board of Examiners') to exclude the complainant from his doctoral studies for a period of one year ('the requested documents'). In response, the agency identified and granted the complainant access to two documents which he considered were not relevant to his access application.
3. They were a copy of a letter to the complainant from Associate Professor Mark Hackling advising him of the decision to exclude him for 12 months and a copy of a memorandum from Professor Judith Rivalland to Student Administration advising of the decision. Both those documents are dated 19 February 2001 and both refer to the decision to exclude the complainant having been made at a meeting of the Board of Examiners on 9 February 2001.
4. The complainant was of the view that more documents should exist. On 22 September 2004 he applied for internal review of the agency's decision to, in effect, refuse him access under s.26 of the FOI Act (refusal where documents cannot be found or do not exist) to the requested documents. The agency confirmed its initial decision that the only documents it could identify as coming within the ambit of the complainant's access application had previously been released to him.
5. On 19 October 2004, the complainant made an application for external review by the Information Commissioner.

REVIEW BY A/INFORMATION COMMISSIONER

6. The agency produced to me the FOI file relating to the complainant's access application and other documents relevant to this matter. In addition, my Investigations Officer made inquiries with the agency in relation to the requested documents and the searches conducted by the agency to locate those documents as well as direct inquiries with a number of Academic staff.
7. On 15 December 2004, my Investigations Officer wrote to the complainant, giving him full details of the searches made by the agency for the requested documents and inviting him to reconsider his complaint on the basis that it appeared that the agency had taken all reasonable steps to locate the requested documents, but they either cannot be found or do not exist.

8. The complainant responded on 17 December 2004 advising that he was not satisfied with the searches made and suggested that further attempts to contact the Chair of the Board of Examiners, Professor Judith Rivalland, might be made, as she had recently returned from overseas. As a result, further inquiries were made directly with Professor Rivalland.
9. On 12 August 2005, I informed the parties, in writing, of my preliminary view of this complaint. My preliminary view was that, following the further searches and inquiries requested by my office, the agency had taken all reasonable steps to find the requested documents but they could not be found. I also raised in a separate letter to the agency a number of concerns I had with inconsistencies in the information provided to my office and the lack of records relating to the decision to exclude the complainant from his doctoral studies.
10. In response to my preliminary view, the complainant referred to an apparent contradiction between statements made by various officers of the agency and the members of the Board of Examiners and declined to withdraw his complaint. The agency also responded to my concerns. The agency agreed that it was of concern that no records exist in the agency which record the decision to exclude the complainant, other than the two documents released to the complainant, informing the complainant and Student Administration respectively that the decision had been made.

DOCUMENTS THAT DO NOT EXIST OR CANNOT BE FOUND

11. Section 26(1) of the FOI Act deals with the obligations of the agency in circumstances where it is unable to locate documents sought by an access applicant or where those documents do not exist.

Section 26 provides:

- “(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.”*

12. I consider that, when dealing with such an issue, there are two questions that must be answered. The first question 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. 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 those documents.
13. I do not consider that it is my function to physically search for the requested documents on behalf of a complainant. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary.

Is it reasonable to believe that the requested documents exist or should exist in the agency?

14. A/Professor Mark Hackling wrote to the complainant in a letter dated 19 February 2001 informing him, amongst other things, that “[t]he Faculty of Community Services, Education and Social Science, Executive Board of Examiners met on February 9 to review [the complainant’s] academic progress” and that “[a]t its meeting on February 9, the Board of Examiners, after a very careful consideration of the issues and consistent with Rule 33(6), resolved to exclude [the complainant] from the Doctor of Philosophy for a period of one year.”
15. It is my understanding that it is on the basis of that letter that the complainant made his access application seeking access to documents relevant to the meeting of the Board of Examiners held on 9 February 2001 and the decision to exclude him from his doctoral studies for a period of one year.
16. As I understand it, the complainant submits that, given the letter dated 19 February 2001 from A/Professor Hackling, there should be some documents in existence which record the decision of the Board of Examiners made at the meeting on 9 February 2001 to exclude him for a period of one year from his doctoral studies.
17. In my view, it would be reasonable to believe, based on the above quotations from A/Professor Hackling’s letter to the complainant, that there was a meeting on 9 February 2001 of the Board of Examiners and that the issue of whether the complainant should be excluded from his doctoral studies was discussed at that meeting and a decision to exclude him for a period of one year was made at that meeting. I also consider it reasonable to expect that some documentation of the meeting and the decision should exist. I understand that meetings of the Board of Examiners are usually minuted.

The searches and inquiries made by the agency

18. In response to my notice requiring the agency, under s.72(1)(a) of the FOI Act, to give me specific information relating to the searches undertaken by it to locate the requested documents, the agency advised, in summary, that in

response to the access application: the complainant's personal file or files (referred to in the agency's letter to me as "the applicant's files") had been searched; inquiries were made with the Faculty's Higher Degrees Office and the Higher Degrees Committee Executive Board of Examiners' files searched; inquiries were made with the Student Services Centre; and inquiries were made with Professor Rivalland.

19. As a result of those searches, only three documents were located: the memorandum of 19 February 2001 from Professor Rivalland to Student Administration; the letter of 19 February 2001 from A/Professor Hackling to the complainant and a memorandum dated 8 February 2001 from A/Professor Glenda Campbell-Evans, Associate Dean, International and Commercial, the complainant's then supervisor, to Judith Rivalland, Chair, Board of Examiners. I understand the complainant has been given access to all of those documents, the third one having been given to him in response to an earlier access application. I understand that Professor Rivalland also advised the officer dealing with the access application that she had no other papers and, to her knowledge, her memorandum was the only advice to the Graduate School and the letter the advice to the complainant.
20. My Investigations Officer requested a list of all those present at the meeting of the Board of Examiners held on 9 February 2001. In response to that query, the agency advised me that the following individuals attended the meeting:
 - Professor Judith Rivalland, Associate Dean, Teaching and Learning for the Faculty of CSESS and Chair of the Executive Board of Examiners;
 - Professor Max Angus, Head of the School of Education;
 - Dr L Pike, Head of School of Psychology;
 - A/Professor Glenda Campbell-Evans, the complainant's PhD Supervisor;
 - Mr Graeme Gower, Head of School, Kurongkurl Katijin;
 - Dr Bill Loudon, Associate Dean, Research and Higher Degrees; and
 - Mrs Toni Lampard, Executive Officer, Higher Degrees Office (Observer only).
21. By an email dated 17 November 2004, my office contacted each of those individuals, asking, amongst other things, whether they took notes of the meeting, or whether there were general notes taken of the meeting purportedly held on 9 February 2001.
22. Mrs Lampard was on leave and has not responded. Professor Rivalland was on leave and has subsequently responded. Her response is detailed later in this decision: see paragraph 29.
23. Professor Angus, Dr Loudon, Mr Gower, A/Professor Campbell-Evans and Dr Pike advised my office, in writing, that they did not attend a meeting of the Board of Examiners on 9 February 2001; have no notes of any such meeting; and can provide no information about it.

24. However, Dr Pike explained that she would have attended the regular Faculty Executive meeting on 9 February 2001. Her notes indicate that the meeting followed the standard format for Executive meetings at the time. Under the Associate Dean for Teaching and Learning's report, Dr Pike observes that she noted "B of E outstanding results need to be dealt with".
25. Dr Pike suggested that it may have been that – as the Executive members, who also comprised the Board of Examiners for the Faculty, were all together – any outstanding Board of Examiners matters could have been dealt with at the time. Dr Pike suggested that, in that case, notification would have been verbal and a decision made on the spot to deal with the Board of Examiners' matters.
26. However, Dr Pike confirmed that she has no notes of such a meeting (and indicated that she would usually take notes) and no record of any discussion about the complainant and his course of study.
27. Ms Alison Cheetham, Executive Officer for the Board of Examiners, also confirmed that there was not an official Board of Examiners meeting on that date, as far as she can ascertain, but advised that "[t]he discussion took place following the Faculty Executive meeting".
28. In her first response to my office Professor Rivalland provided the same list of attendees of the meeting as had been provided by the agency previously and advised that the meeting was called verbally by Dr Loudon. When subsequently advised of the responses outlined above, Professor Rivalland explained that, given the meeting took place some four years ago, her recollections may not have been entirely accurate. Professor Rivalland explained that in the intervening four years she has changed offices and campuses more than once and does not have in her possession her diary from 2001.
29. Professor Rivalland advised my office that the recollections of which she can be confident are as follows:

"I was asked to Chair an Executive meeting of the Board of Examiners on the 9 February. This meeting was called at short notice and was held after the Faculty Executive meeting scheduled for that day. The purpose of the meeting was to discuss the academic progress of Mr Mallett. Other people were present. Quite an extensive discussion occurred about the poor progress of Mr Mallett [sic] and the efforts that had been made by his supervisor to encourage him to make better progress. This matter was not taken lightly and the people present investigated the matter thoroughly. The thoroughness of the discussion and concern for the well-being of the student led the Committee to make the decision to exclude Mr Mallett [sic] for a period of one year instead of excluding him indefinitely which was normal practice under the rule. It was felt that this action would give him the opportunity to get his life sorted out and recommence his studies if he so wished.

This information was conveyed to Mark Hackling, who was then Chair of the Higher Degrees Committee, on this advice he was to write a letter to Mr Mallett [sic] to inform him of the decision and why it had been taken.

I sent a memo to Student Services to inform them of the exclusion and the conditions of the exclusion so that this could be placed on his record and I requested that the letter written by Mark Hackling also be placed on his record. This memo was confirmation of the decision made by the committee as it is not standard practice to record the nature of the discussions that occur about students at a Board of Examiners meeting - only decisions are recorded”.

30. My office also contacted A/Professor Mark Hackling, the author of the letter dated 19 February 2001 to the complainant. A/Professor Hackling confirmed that he had not attended the meeting, but he had been advised by Professor Rivalland by telephone of the decision of the meeting and to write and advise the complainant of that decision.
31. The agency has also advised me that there was no scheduled meeting of the Board of Examiners held on 9 February 2001. The agency advised me that, in normal circumstances, the Board of Examiners meets on a monthly basis and that its usual scheduled meeting took place on 1 February 2001. The agency also informed me that it is the usual practice for meetings of the Board of Examiners that an agenda is sent to all members and that minutes are taken by an Executive Assistant and those minutes are kept in files specifically maintained for minutes of meetings of the Board of Examiners. I have also been advised by the agency that it is the usual practice of the agency to minute the decisions of the Board of Examiners and then the relevant people are advised of those decisions by memoranda or letters.
32. My office has examined the agency’s file which contains the originals of the agendas for meetings of the Board of Examiners. Based on my office’s examination of those files, I understand that there are no minutes of, or an agenda for, a meeting on 9 February 2001 of the Board of Examiners. In that file there is an agenda for a meeting of the Faculty’s “Higher Degrees Sub-Committee and Board of Examiners” on 1 February 2001. There are also minutes of that meeting, although I note that the minutes are headed only “Higher Degrees Sub-Committee” and not “Board of Examiners”. There are also an agenda for, and minutes of, a meeting of the Faculty’s “Higher Degrees Sub-Committee and Executive Board of Examiners” on 15 February 2001. The complainant’s name does not appear in any of those documents and it appears from those documents that the complainant’s academic progress was not discussed or dealt with at either of those meetings.
33. The attendees of both of those meetings were Associate Professor Loudon, Dr Tony Fetherston, Dr Jill Dury, Dr Patricia Baines and Mrs Toni Lampard. The minutes indicate that the meeting on 1 February 2005 was also attended by Dr Lynne Cohen.
34. My office has contacted Dr Fetherston, A/Professor Dury and Dr Cohen. They have all confirmed in writing that they have no recollection or record of attending a meeting on 9 February 2001, or any meeting, at which the academic progress of the complainant was discussed.

35. In addition, my office has examined the original files containing the minutes and agendas of the Executive Group of the Faculty of Community Services, Education and Social Sciences.
36. I understand that those records evidence that there was a meeting of that group on 9 February 2001. Present at that meeting were:
- Prof S Holland;
 - Prof M Angus;
 - A/Prof G Campbell-Evans;
 - Mr G Gower;
 - A/Prof W Louden;
 - A/Prof G McKay;
 - Dr L Pike;
 - A/Prof J Rivalland; and
 - Mr G Zlnay.
37. However, my office having examined the minutes and the agenda papers for that meeting, I understand that there are no references to the complainant or any comments about him at all, in those documents. I note, however, that under item 5 “Teaching and Learning” the minutes record that “[a] *Board of Examiners* has been arranged to consider outstanding examination results”. The minutes do not state when that was to occur.
38. My office has contacted Professor Holland, A/Professor McKay and Mr Zlnay (the other attendees having been previously contacted) and inquired as to their recollections, if any, of whether they attended a meeting of the Executive Group of the Faculty of Community Services, Education and Social Services on 9 February 2001 and whether any discussions were held during that meeting relating to the complainant’s progress in his doctoral studies and whether any decision was made at that meeting to exclude him from his doctoral studies. A/Professor McKay advised that he has no records or recollection of a meeting on 9 February 2001, nor any notes of such a meeting. Professor Holland advised that she is no longer employed by the agency so has no access to its records and has no recollection of the matter.
39. Mr Zlnay has advised my office in writing that he was, at the time, a member of the Faculty Executive Group but not the Board of Examiners and therefore would not have attended a meeting of the Executive of the Board of Examiners. Mr Zlnay did confirm that he recalled attending a meeting of the Executive Group of the Faculty of Community Services, Education and Social Sciences on 9 February 2001, but has no recollection of any discussion taking place relating to the complainant, or to his exclusion from his Doctor of Philosophy studies for a period of twelve months.
40. It appears from the minutes of all the February meetings that Dr Pike’s advice – that the members of the Executive also comprise the Board of Examiners – was not correct. From the minutes of the meetings of the Board of Examiners in February 2001 and the minutes of the meeting of the Faculty’s Executive group,

it would appear that the only common member of the two groups was A/Professor Louden.

41. In the course of my dealing with this complaint, while dealing with another access application from the complainant (which is now also the subject of a complaint to me), the agency discovered and gave the complainant access to two copies of another "original" of Professor Rivalland's memorandum of 19 February 2001, advising him that it appeared that the professor had signed two copies of the memorandum. Two copies were provided, one showing a note attached to the memorandum and one showing the text beneath the note. The agency also discovered and gave the complainant access to a signed original of A/Professor Campbell-Evans's memorandum of 8 February 2001.
42. A copy of the signed original of A/Professor Campbell-Evans's memorandum was produced to me on 13 October 2005, as I was in the process of finalising this decision. It bears a handwritten note which reads "[a]pproved by Board of Examiners 9/2/2001" and Professor Rivalland's signature. The memorandum itself is stated to have been in response to an e-mail of 5 February from the "Associate Dean, Research & Higher Degrees" regarding the complainant's academic progress. It summarizes the complainant's academic progress over the preceding year and concludes with a recommendation that a one-year exclusion be applied, together with two re-enrolment conditions. Clearly, that document should have been identified in response to the complainant's access application more than 12 months ago.
43. The fact that the recommendation to which effect was subsequently given was contained in the memorandum together with the reasons for it and the handwritten notation on the document suggest to me that, if there was a meeting of the Board of Examiners on 9 February 2001, that document formed the basis of discussion as to the action to be taken in respect of the complainant.
44. Other than the recollection of Ms Cheetham - who did not attend any of the relevant meetings - and Professor Rivalland's memorandum, assertions as to her recollections and notation on Professor Campbell-Evans's memorandum, there is no evidence of a meeting of the Faculty's Board of Examiners having been held on 9 February 2001. None of the other people I was told attended has any record or recollection of such a meeting. No minutes or other record of such a meeting have been produced to me. Nor is there any other evidence presently available to me of the complainant's academic progress and suspension having been discussed and decided at any Board of Examiners' meeting.
45. I would have expected as a matter of good administrative practice that, if the meeting occurred, there would be some further documentation concerning the matter. For example, I would consider it reasonable to expect that there would exist some documentation recording, at the least: the fact that a meeting of the Board of Examiners took place on 9 February 2001; what was discussed at that meeting; and the decisions taken at that meeting. However, despite inquiries by my office, there is no evidence before me that any documents exist within the agency other than those to which the complainant has already been given access.

46. If there was not a meeting of the Board of Examiners on that date, at which the complainant's academic progress was discussed and a decision about it made, contrary to the written advice given to the complainant, then serious questions arise as to the manner in which the decision to exclude him from his doctoral studies was made, who made the decision and the veracity of what the complainant was told about it. On the other hand, if there was, in fact, such a meeting, then the dearth of documentation relating to it raises questions about the agency's record-keeping practices, as do the difficulties experienced by the agency in identifying and locating all relevant documents in response to the complainant's access application and in response to the complaint to my office. I accept that after four years, people's recollections of attending a particular meeting of a series of regular meetings may well have faded or gone altogether. Because the people interviewed cannot now recall attending such a meeting does not necessarily mean the meeting did not take place. However, in the absence of those memories and any proper record of it, it is not now possible to establish clearly what happened. This complaint highlights the fundamental importance of proper record keeping in terms of agencies' accountability for their processes, actions and decisions, particularly decisions that directly and significantly affect individuals.

CONCLUSION

47. Having reviewed the searches undertaken by the agency, and the inquiries conducted by my office, I am satisfied that all reasonable steps to find the requested documents have now been taken but that the requested documents cannot be found. As I have indicated above, the fact that documents of the type requested by the complainant cannot be found raises a number of serious questions about the administrative processes and/or record-keeping practices of the agency in this instance. However, it is not my role as Information Commissioner to investigate complaints about agencies' administrative processes or record-keeping practices. Those are matters that the complainant may choose to pursue through other avenues. Accordingly, I confirm the agency's decision to refuse access under section 26(1) of the FOI Act on the ground that the requested documents cannot be found.
