Decision D0062025 – Published in note form only

***Re The University of Western Australia and Department of Jobs, Tourism, Science and Innovation* [2025] WAICmr 6**

Date of Decision: 26 June 2025

***Freedom of Information Act 1992* (WA): section 20**

On 15 March 2022, a representative of the Centre for Mining Energy and Natural Resources Law, which is part of the Law School of the University of Western Australia (**the complainant**) applied to the Department of Jobs, Tourism, Science and Innovation (**the agency**) under the *Freedom of Information Act 1992* (WA) (**the FOI Act**) for access to a document listing the agency's electronic files which include the term 'FOI' or 'freedom of information'.

By notice of decision dated 4 May 2022, the agency decided to refuse the complainant access to the requested document under section 26 of the FOI Act (**section 26**) on the basis that the document does not exist or cannot be found.

The complainant sought internal review of the agency's decision and, by internal review decision dated 2 June 2022, the agency confirmed the initial decision. The agency advised the complainant that, although it had considered creating a document to satisfy the complainant's access application, it had determined that it 'would not be able to replicate the information easily in order to create a document containing the requested information'.

On 29 June 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The Commissioner obtained the agency's FOI file maintained in respect of the access application.

Between June 2022 and February 2024, various communications took place between the Commissioner's officers and the parties in an attempt to resolve the matter by conciliation. Those attempts were unsuccessful.

On 16 February 2024, one of the Commissioner's officers (**the officer**) provided the agency with her assessment of the matter, which was that the agency's decision under section 26 did not appear to be justified and that the agency could give access to the requested document(s) in the manner described in section 27(1)(g) of the FOI Act (**section 27(1)(g)**). The agency accepted the officer's assessment and, in effect, withdrew its reliance on section 26. However, the agency claimed that the process to give access to the requested document(s) under section 27(1)(g) would divert a substantial and unreasonable portion of its resources away from its other operations under section 20 of the FOI Act (**section 20**).

On 6 March 2024, the officer advised the complainant that the agency accepted the officer's assessment and now claimed that dealing with the access application would divert a substantial and unreasonable portion of its resources away from its other operations, as described in section 20. The complainant responded and advised the officer that it was their view that the decision under review is the decision made by the agency to refuse access to the document under section 26.

On 11 March 2024, the officer invited the complainant to consider changing the scope of its access application to reduce the amount of work required to deal with it. The complainant responded and repeated its earlier submission that its application for external review is in respect of the agency's decision under section 26.

On 11 September 2024, another of the Commissioner's officers (**the other officer**) contacted the complainant and advised that it was her assessment that the Commissioner would likely consider the agency's claim under section 20 was justified. The other officer again invited the complainant to consider narrowing the scope of the access application, referring to a previous proposal from the agency outlining the terms of a reduced scope.

On 20 September 2024, the complainant maintained its earlier advice that it 'requires a determination by the Commissioner of the decision made by the agency in 2022 under section 26'.

On 3 October 2024, the other officer provided the parties with her assessment of the matter, which was that the Commissioner would likely consider the agency's claim under section 20 was justified.

The complainant did not accept the other officer's assessment and made further submissions.

The Commissioner observed that sections 64, 70 and 71 of the FOI Act provide her with powers to deal with complaints before her on external review.

Section 76(1)(b) of the FOI Act provides that, in dealing with a complaint, the Commissioner has the power to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency. In *Pearlman v WA A/ Information Commissioner* [2019] WASC 257 the Supreme Court concluded that the Commissioner is not bound to determine an external review matter by having regard only to the reasons given by the original decision-maker: see [75] and [76].

Section 20 provides that:

> (1) If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.
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> (2) If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.

Section 20 is designed to ensure that the operations of government agencies are not unduly impeded by agencies having to deal with unreasonably voluminous access applications. It is one of a number of provisions in the FOI Act aimed at striking a balance between, on the one hand, the public interest in open and accountable government and, on the other hand, the public interest in the ongoing effective operation of agencies: *Re Ravlich and Attorney General; Minister for Corrective Services* [2009] WAICmr 17 (***Re Ravlich***) at [15].

After considering all of the material before her, the Commissioner was satisfied that the agency had taken reasonable steps to assist the complainant to change the access application to reduce the amount of work needed to deal with it. On at least three occasions during the external review suggestions were put to the complainant on how the scope of the application could be reduced to a manageable level. This included a proposal from the agency on two separate occasions to limit the range of requested documents to specific document types such as 'Freedom of Information Management case files'; reducing the date range of the requested documents; and limiting the requested documents to those that were located in the agency's record keeping system. The complainant's representative declined to engage in discussions to reduce the scope of the access application. The Commissioner observed that, while section 20 places agencies under a duty to assist applicants, there must be a corresponding obligation on applicants to work cooperatively with an agency and an element of reasonableness must be implied in the process, for the legislation to work satisfactorily: *Re Ravlich; Re Park and SMHS - Royal Perth Hospital* [2014] WAICmr 18 at [36].

The Commissioner accepted the agency's submission that to process the access application would require a search of multiple systems currently used by the agency. The agency explained that it accesses its business systems via another agency's network under a shared services arrangement and does not have the functionality in its record keeping systems to extract the information requested into a discrete document. The Commissioner noted that the number of potential documents covered by an application, and the ease with which the specific documents can be identified and assessed, are relevant to the question of whether the work involved in dealing with an access application would divert a substantial and unreasonable portion of an agency's resources away from its other operations: see *Re Ballam and Shire of Toodyay* [2009] WAICmr 4 at [34].

The Commissioner accepted the agency's submission that the process to be applied to each of its record keeping systems in an attempt to extract information to populate a document, under section 27(1)(g); the detailed examination of those results required to identify exempt matter (especially personal information of private individuals); the editing of those results; and potential third party consultation, meant that the work involved in dealing with the complainant's access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

Accordingly, the Commissioner set aside the agency's decision and, in substitution, found that the agency was entitled to refuse to deal with the access application under section 20 of the FOI Act.