

Decision D00102025 – Published in note form only

Re Harrison and City of Joondalup [2025] WAICmr 10

Date of Decision: 31 October 2025

Freedom of Information Act 1992 (WA): section 26

For the reasons given to the parties and summarised below, the Acting Information Access Deputy Commissioner (**the A/FOI Deputy Commissioner**) found the decision of the City of Joondalup (**the agency**) to refuse Mark Harrison (**the complainant**) access to documents, under section 26 of the *Freedom of Information Act 1992 (WA)* (**the FOI Act**), was justified and confirmed the agency's decision.

On 17 February 2022, the complainant applied to the agency under the FOI Act for access to a broad range of documents, which included:

- phone records of named Council members;
- correspondence between those Council members, named members of Parliament and other named third parties; and
- correspondence relating to a particular development application.

The access application specified that the requested correspondence included mobile phone text messages.

By notice of decision dated 1 April 2022, the agency identified 29 documents within the scope of the complainant's access application and, in the main, gave him access to edited copies of those documents.

The complainant considered additional documents should exist within the scope of his access application. By internal review decision dated 26 April 2022, the agency confirmed its initial decision and advised further documents could not be found or did not exist. Effectively, the agency refused the complainant access to further documents under section 26 of the FOI Act (**section 26**).

Subsequently, on 20 June 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision, maintaining his claim that further documents existed. In particular, the complainant claimed further text messages and emails between the named Council members and the named third parties existed.

The agency provided the Commissioner with its FOI file maintained in respect of the complainant's access application. One of the Commissioner's officers (**the officer**) made inquiries with the parties and obtained additional information.

On 21 February 2024, the officer provided the parties with his assessment of the matter, which was that the Commissioner was likely to consider, on the information then before this office, that the agency's decision to, in effect, refuse the complainant access to further documents under section 26 was justified. The complainant did not accept the officer's assessment and provided further submissions.

Section 26 provides that an agency may refuse access to a document if all reasonable steps have been taken to locate the document, and it is satisfied that the document is either in the agency's possession but cannot be found, or does not exist. The Commissioner considers, in dealing with section 26, the following questions must be answered:

1. Are there reasonable grounds to believe the requested documents exist, or should exist and are, or should be, held by the agency?
2. If those questions are answered in the affirmative, the next question is, has the agency taken all reasonable steps to locate those documents?

As observed in *Re Boland and City of Melville* [1996] WAICmr 53 at [27], the question is not whether an agency has taken every possible step to locate documents, but whether it has taken all reasonable steps. The adequacy of an agency's efforts to locate documents is to be judged having regard to what was reasonable in the circumstances: see *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 (*Re Leighton*) at [85] and *Re Veale and City of Swan* [2012] WAICmr 12.

The A/FOI Deputy Commissioner considered the material before her including the searches and inquiries the agency conducted and the complainant's submissions. The A/FOI Deputy Commissioner was satisfied the agency had taken all reasonable steps to find the requested documents and that further documents (including further text messages) either could not be found or do not exist.

The A/FOI Deputy Commissioner was of the view that, requiring the agency to conduct a forensic examination of mobile phones and other electronic devices, including metadata searches, as the complainant suggested, went beyond 'all reasonable steps'.

The A/FOI Deputy Commissioner accepted that, if there was evidence before her to suggest the requested documents had been deleted or destroyed to prevent the agency from giving access to them, 'all reasonable steps' might include a forensic examination of the agency's electronic devices: see for example, *Re Leighton* at [98]-[99]. However, there was no such evidence before the A/FOI Deputy Commissioner.

The A/FOI Deputy Commissioner noted it is not her role to examine in detail an agency's record keeping practices, but rather to ensure that agencies are aware of their responsibilities under the FOI Act. This includes highlighting deficiencies in an agency's record keeping practices that may impact upon the proper functioning of the FOI Act, where such deficiencies are uncovered in the course of an external review: see *Re Cox and Town of Claremont* [2009] WAICmr 36 at [33].

During the external review, the A/FOI Deputy Commissioner had regard to the agency's record keeping policies in relation to text messages sent to or by Council members that relate to the business of the agency. The agency's record keeping plan notes that text messages are a type of record that should be created and captured in the agency's record keeping system whenever they relate to the business of the agency. However, the plan does not describe the actions Council members should take to capture appropriately text messages in the agency's record keeping system.

Given the widespread use of mobile phones for communicating information by ordinary text messaging applications, messaging applications such as WhatsApp and Facebook messenger

and even by way of social media posts and their responses (collectively ‘**text messages**’), the A/FOI Deputy Commissioner considered it is reasonable to expect local government Council members to receive text messages that relate to the business of their local government. Noting that good record keeping underpins the right of access to documents under the FOI Act, the A/FOI Deputy Commissioner observed that local government agencies should have policies and/or procedures outlining the steps required to capture text messages that relate to local government business into an agency’s record keeping systems. This should help ensure text messages sent to or by Council members are appropriately captured in an agency’s record keeping systems, and can be readily located, including in response to an FOI application.

The A/FOI Deputy Commissioner noted that, without clear guidelines, there is a higher risk text messages recording significant decisions and discussions will not be appropriately retained. This may lead to an incomplete record of an agency’s actions and decisions, undermining the public’s ability to fully understand and scrutinise those actions. Missing records can result in significant information gaps, weakening an agency’s transparency and accountability.

Nevertheless, the A/FOI Deputy Commissioner did not consider the agency’s record keeping practices in this case adversely impacted the complainant’s right of access to documents, or prevented the complainant from obtaining access to documents within the scope of his access application.