



OFFICE OF THE INFORMATION COMMISSIONER

Our Ref: F2005209
Your Ref: W97-0100

Smithson Planning
364 Middleton Road
ALBANY WA 6330

SMITHSON PLANNING
364 Middleton Road Albany WA 6330
PO Box 5377 Albany WA 6332
Tel/Fax: (08) 9842 9841
Mobile: 0419 556 444



Attention: Mr Neil Smithson

Dear Sirs

FREEDOM OF INFORMATION ACT 1992
COMPLAINT - DEPARTMENT FOR PLANNING AND INFRASTRUCTURE

1 I refer to previous correspondence in relation to this complaint, which arises from a decision made by the Department for Planning and Infrastructure ('the agency') under the Freedom of Information Act 1992 ('the FOI Act') to refuse Smithson Planning ('the complainant') access to documents.

2 This letter contains my preliminary view of this matter. My preliminary view is not my final determination but is given to inform the parties of my understanding of the facts and my view of the complaint, based on the material currently before me. The purpose of this is to give the parties the opportunity to correct any factual errors in my letter and to provide me with further material and submissions in support of their respective positions before I finalise the complaint by way of a published decision, if necessary. If both parties accept my preliminary view, then this complaint will be resolved.

Preliminary view

3 It is my preliminary view, for the reasons given below, that the agency has now taken all reasonable steps to find the requested documents but that those documents cannot be found or do not exist.

Background

4 I understand that the complainant is a private consultancy specialising in organisational management, town planning and environmental assessment, which has prepared a regional strategy, known as the Rainbow 2000© Project ('the Project'), for Albany and the lower Great Southern Region of Western Australia.

5 On 28 July 2005, the complainant applied to the agency under the FOI Act for access to 'correspondence pertaining to the Rainbow 2000© Project' including a copy of any record of a meeting between Mr Neil Smithson and the Regional Manager - Great Southern on Thursday, 9 October 1997 and 'all subsequent correspondence (eg. file

5 notes, letters, facsimiles, ministerials, reports & recommendations) within and between the:

- ❖ *WA Ministry for Planning*
- ❖ *WA Planning Commission*
- ❖ *WA Dept for Planning & Infrastructure*
- ❖ *Minister for Planning & Heritage (Kierath)*
- ❖ *Minister for Planning & Infrastructure (MacTiernan)*".

6 On 1 August 2005, the complainant advised the agency that it was also seeking access to "... a copy of the media statement issued by the WA Dept of Transport (Roy Johnson, Regional Coordinator) on 4 March 1999."

7 On 6 September 2005, the agency issued its notice of decision and gave the complainant access to the following three documents, edited to delete personal information, pursuant to clause 3(1) of Schedule 1 to the FOI Act:

1. A memorandum dated 30 June 1998 from Regional Manager, Great Southern, to Director, Planning Implementation, concerning Mr Smithson's request for a meeting with the Chief Executive Officer ('CEO') to discuss the Project.
2. A memorandum dated 30 June 1998 from Regional Manager, Great Southern, to the CEO providing background information relevant to the meeting in Document 1. The memorandum refers to three attachments but those attachments were not given to the complainant by the agency, which advised the complainant that "...copies were not placed on the file with the memorandums and a search within the Department has also failed to locate them."
3. A media release dated 4 March 1999 issued by Mr Roy Johnson, Regional Coordinator.

8 In its notice of decision, the agency said that it had spoken to Mr Phillip Woodward about the complainant's request for a record of its meeting with him on 9 October 1997 but that Mr Woodward had no recollection of any formal meeting with Mr Smithson on that date and the agency had no record of that meeting. Consequently, the agency advised the complainant, pursuant to s.26 of the FOI Act, that it was satisfied that the record of that meeting and the attachments to Document 2 either did not exist or could not be found and that, therefore, it was not possible to give access.

9 On 8 September 2005, the complainant sought an internal review of the agency's decision and said:

*"The Rainbow 2000© Project was raised on multiple occasions (refer our Schedule of Community Participation MS Word document **R2000Participation.doc** as available from our website www.smithsonplanning.com.au) with the WA Ministry for Planning, the WA Dept for Planning & Infrastructure, the WA Planning Commission and the two Ministers Kierath and MacTiernan over the last nine years.*

9. ...
Whilst it is difficult to believe that our correspondence generated just 3 internal communications over that 9-year period, I would refer to our specific request addressed to Mr Terry Martin dated 29 Dec 2003, and the subsequent response provided by Mr Jeremy Dawkins dated 17 Feb 2004 (to paraphrase my personal discussion with Mr Dawkins on the subject at the AAPC AGM 2004 of 15 Jun 2004 - 'it just isn't going to happen').

I find it difficult to accept that both WAPC Chairmen would either make or not make such a decision (as the case appeared to be) without first consulting the Executive Management Team of the WA Dept for Planning & Infrastructure, or for that matter the Minister (and documenting such discussion and consideration)."

- 10 I understand that Mr Dawkins is the current, and Mr Martin the former, Chairman of the Western Australian Planning Commission ('WAPC').
- 11 On 16 September 2005, the agency gave the complainant its notice of decision on internal review, stating that, in its view, the reason that there had been very little internal communication over a nine-year period was because the Project "...was never the subject of any meetings, internal discussions or communications." The agency also noted that the complainant was advised on numerous occasions that the Project was not one that the WAPC would consider or support. The agency gave the complainant copies of six letters which, although it did not consider that they came within the scope of the complainant's application, related to the Project. Those documents are described, as follows:
- (i) A letter dated 16 December 1997 from Regional Manager, Great Southern Region, Planning Implementation Division, to Executive Director, Albany Chamber of Commerce.
 - (ii) A letter dated 17 December 1997 from Executive Director, Albany Chamber of Commerce to Great Southern Regional Manager.
 - (iii) A letter dated 30 July 1998 from Manager, Planning and Development, Shire of Denmark to WAPC.
 - (iv) A letter dated 25 September 1998 from Regional Manager, Great Southern Region, Planning Implementation Division, to CEO, Shire of Denmark.
 - (v) A letter dated 17 February 2004 from the Chairman of the WAPC to the complainant.
 - (vi) A letter dated 22 April 2004 from the Chairman of the WAPC to the complainant.
- 12 Thereafter, on 22 September 2005, the complainant applied to me for external review of the agency's decision.

Review by A/Information Commissioner

13 On receipt of this complaint I obtained the agency's FOI file maintained in relation to the complainant's access application and my office asked the agency to supply further information concerning the requested documents and the searches made for those documents. The agency provided my office with the requested information.

14 In addition, my Legal Officer wrote to the complainant on 5 October 2005 to confirm the scope of its complaint and to seek further information in relation to meetings and other activities relevant to the search for further documents. Following a discussion with my Legal Officer on 26 October 2005, the scope of the complainant's access application was confirmed, in writing, to be all correspondence relating to the Project held by the agency and, in particular, to documents - not limited to correspondence - that passed:

- (i) within the agency and the former Ministry for Planning;
- (ii) between the agency, the WAPC and the Minister for Planning and Infrastructure; and
- (iii) between the former Ministry for Planning, the former Minister for Planning and Heritage and the WAPC.

15 I understand that the complainant is not seeking access to the ministerial correspondence generated by the complainant or correspondence between current and former Ministers and the complainant. However, I had further inquiries made with the agency, which conducted additional searches of files from the Transport Division of the agency. Since the agency was created on 1 July 2001 by the merging of the former Ministry for Planning with the former Department of Transport, the scope of the access application includes correspondence relating to the Project held by the agency which derived from the former Department of Transport. Those searches located two letters, dated 10 January 2003 and 28 March 2003 (ministerial numbers 024525 and 026392), both being copies of letters to the complainant from the Minister's office but I understand that the complainant is not seeking access to that correspondence.

16 The complainant provided no further information in response to my Legal Officer's request for additional information concerning dates and details of contacts between the complainant and the agency or Ministers.

Documents that do not exist or cannot be found

17 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.

18 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*

18. (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."*

19 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 is whether the agency has taken all reasonable steps to find those documents.

20 I do not consider that it is my function to physically search for the requested documents on behalf of a complainant. Provided that I am satisfied that the requested documents exist, or should exist, I consider that it is my role to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted, if necessary.

The complainant's submission

21 In its letter to this office of 22 September 2005, the complainant submitted that the Project was raised on numerous occasions with the relevant agencies and Ministers and referred me to the "Schedule of Community Participation" document held on its website, which apparently lists, among other things, documents sent and received by the complainant in relation to the Project over a nine year period, together with media notices and a record of discussions and presentations sought and held in connection with the Project.

22 In particular, the complainant says the following:

- (a) On 17 February 2004, the WAPC responded to the complainant's request to brief it on the Project - made on 29 December 2003 - and that letter shows that the then new Chairman, Mr Dawkins, asked officers of the agency to investigate the issues at the core of the Project, including CBD, waterfront development and port, road and rail access.
- (b) It accepted an invitation from Mr Stephen Petersen, (Regional Manager, Great Southern, of the agency) to brief the Albany office planners on 26 February 2004. Later, the complainant received a further letter from Mr Dawkins dated 22 April 2004, and queries whether the Chairman's reference in that letter "...that 'we' are unable to include [the Project] on [sic] a meeting of the Commission" indicates that other persons were party to that decision-making process. The complainant considers that the Chairman of the WAPC would

22 ...

not make such a decision “*without first consulting the Executive Management Team of the WA Dept for Planning & Infrastructure, or for that matter the Minister (and documenting such discussion and consideration).*”

- (c) On 24 May 2004, the Hon. Ken Travers MLC, Parliamentary Secretary for Planning and Infrastructure, wrote to an Albany constituent stating in part “*In regard to the relocation of the port, previous estimates have shown that the cost would be prohibitive.*” The complainant considers that this indicates that the possibility of port relocation had been identified as an issue by the Minister for Planning and Infrastructure and that someone conducted an evaluation of that outcome.
- (d) It considers it unlikely that there has never been a departmental evaluation and written report to either the Chairman, the WAPC or the Minister in relation to the Project or key aspects of the Project such as the port relocation proposal.
- (e) It has several references on its records to correspondence between Ministers past and present, essentially where one Minister suggests that the Minister for Planning and Heritage/Planning and Infrastructure was the responsible Minister and, accordingly, there should exist letters in response from either the former Minister or the current Minister to his/her Cabinet colleague.

The agency's submission

23

The agency submits that, with reference to the meeting between Mr Neil Smithson and Mr Phillip Woodward on 9 October 1997, referred to in the access application and on pages 1 and 2 above, it made enquiries with Mr Woodward who says that he has no recollection of any formal meeting with Mr Smithson on that date and, in addition, the agency's searches have been unable to locate any record of such a meeting.

24

With regard to the reference to three attached documents referred to in Document 2, the agency says that copies were not placed on the file holding Document 2 and further searches on its computer system and in its hard copy files have failed to locate them.

25

The agency says that the complainant was advised on numerous occasions that the Project was not a matter that the WAPC would consider or support and submits that, in consequence, there were no formal meetings, internal discussions or communications in relation to the Project and, thus, no documents were generated.

26

Contrary to the complainant's assertions, the agency says that it cannot be assumed that officers will always make file notes after attending presentations or discussing issues with people and this is particularly so when the subject matter is not something which the agency intends to pursue.

The existence of the documents

- 27 I understand that the agency has given the complainant access to nine documents (Documents 1-3 and Documents (i)-(vi) described on pages 2 and 3 of this letter). In my view, only Documents 1-3 come within the scope of the access application.
- 28 From the documents listed in the complainant's Schedule of Community Participation document, I note that the Schedule records that the complainant:
- held discussions with the Ministry for Planning on 9 October 1997 (item 31), 24 February 1998 (item 137) and 3 July 1998 (item 241) and with the agency on 26 October 2004 (item 4763);
 - gave a presentation to the Office of the Minister for Planning on 8 September 1998 (item 315); a briefing to the Minister for Transport on 29 October 1998 (item 447); and a presentation to the agency at its Albany Office on 26 February 2004 (item 4277); and
 - received a letter from the Chairman of the WAPC on 23 February 2004 acknowledging a letter of 29 December 2003 (item 4215).
- 29 In relation to those activities, the agency has given the complainant access to Documents 1 and 2 (which appear to relate to the discussions in July 1998); Document 3 (concerning the meeting with the Ministry for Planning in July 1998); and Document (v) (which appears to relate to the letter received from the WAPC in February 2004).
- 30 The question for my determination is whether there are reasonable grounds to believe that further documents within the scope of the access application exist or should exist and are, or should be, held by the agency.
- 31 The complainant submits that there should be further documents arising from Mr Dawkins' letter of 17 February 2004, which said:
- "I have requested that officers of the Department for Planning and Infrastructure investigate the issues in relation to the city, its waterfront and access to the port. Upon receipt of this information, I will give further consideration to your request."*
- 32 The complainant understands that letter to indicate that a written request was made to certain officers to investigate matters relating to the Project and that they would supply written advice in response. That letter does not, however, establish that that was the case since any such request and advice may have been received verbally, although I would not consider it unreasonable to expect that advice on issues of that nature, if investigated, would be documented.
- 33 However, I also note that the body of the letter does not refer to the Project but only refers to a request to investigate "...the issues relating to the city, its waterfront and access to the port." It may be that those issues were or had been considered independently of any consideration of the Project and, in my view, the same applies to

- 33... the complainant's reasoning in connection with the submission set out in (c), above. Accordingly, I am not persuaded that the letter of 17 February 2004 or the statement of Mr Travers, cited by the complainant in (a) and (c) of its submission, establishes that further documents in relation to the Project exist or should exist.
- 34 The complainant also submits (in (b)) that Mr Dawkins' reference "*...that we are unable to include [the Project] on a meeting of the Commission*" suggests that other persons were involved in that decision and that those persons were "*the Executive Management Team of the WA Dept for Planning & Infrastructure, or for that matter the Minister*" and that the ensuing discussion and consideration would be documented.
- 35 I understand from the WAPC that where a report on an issue is commissioned - or, in other words, funded - by the Government the WAPC's Planning Officer prepares a report which is then passed to the Committee Secretary who places it on the agenda for the next meeting of the WAPC. In this case, the WAPC advised that a report was never prepared because the WAPC was not interested in the Project.
- 36 There is nothing on the face of Mr Dawkins' reference to support the conclusion drawn by the complainant that other persons were involved in the decision not to consider the Project. It seems to me that the reference to "we" is more likely, in context, to be a reference to the WAPC, in the sense that the WAPC would not be supporting the proposal and thus would not be considering it at a meeting of the WAPC.
- 37 My Legal Officer made inquiries with the WAPC and was advised by the Executive Officer to the Chairman that, under the relevant legislation, the Chairman was not and is not obliged to consult with other members of the WAPC or the agency before deciding that the WAPC is not going to deal with a proposal by a private individual, such as the Project.
- 38 In my opinion, the complainant's submission in (d) is speculative. Having examined the material before me, I note that the documents located by the agency, to which you have been given access, relate to two periods: 1997-1999 and 2004. There is nothing in any of the documents which indicates that the agency, or any former agency or Minister, ever supported or seriously considered the Project.
- 39 The Executive Officer to the Chairman of the WAPC advised that, in the present case, it became clear very quickly that the WAPC would not be interested in the Project and it was that officer's recollection that in 2004 a planning officer in Albany had been consulted by way of a telephone call in relation to the Project but that no file note of that conversation had been retained because, in view of the straightforward nature of the matter, it was not considered necessary.
- 40 In addition, I understand that the former Department of Transport issued a media release in March 1999 stating that it did not support the Project's proposal to relocate the Port of Albany. In the course of dealing with this complaint, the agency consulted Mr Roy Johnson, the officer who issued that media release, who advises that, at that time, local people were under the impression that the plan to relocate the port was supported by the Government and the media release was issued to state categorically

40... that that proposal did not have the support of the Department of Transport. Mr Johnson confirms that as far as he is aware no costings were made in relation to the port relocation because there were never any plans to move the port. The agency also advises that, to the best of its knowledge, no costings were undertaken in relation to a proposed relocation of the port because that proposal was never seriously considered.

41 On the information before me there is nothing to show that the Project was ever regarded as a proposal of interest to the agency or the WAPC and, if that is correct, it would not be unlikely that there has never been a departmental evaluation or any written report on the Project, as the complainant submits.

42 In respect of the complainant's submission in (e), my own understanding of such ministerial processes is that, if a Minister receives correspondence pertaining to an area of responsibility of another Minister, he or she forwards the correspondence to the responsible Minister to deal with it. The responsible Minister deals with it and does not generally respond to the Minister who sent (other than, perhaps, to acknowledge its receipt) as there is no need to do so. I do not accept, therefore, that the fact that correspondence was referred from one Minister to another raises a reasonable expectation that a response from the receiving Minister, concerning the substance of the correspondence, exists.

The searches and inquiries made by the agency

43 In response to my office's request for further information on the searches conducted by the agency, the agency says that searches were made of all relevant files held at its Albany office and at its off-site storage centre. Those files were nominated by its Albany staff as the most likely to hold relevant documents and the searches were made by Ms Julie Stubbs, an FOI Officer. Those searches included searches of the agency's hard copy files and its computer system, using keywords including, Rainbow 2000, Smithson, Albany, port and relocation.

44 The agency advises that the Albany office is a small regional branch of the agency, which deals with statutory land and planning matters in the Great Southern Region and reports to the WAPC regarding statutory planning in the region, including local planning strategies, town planning schemes and amendments and structure plans and subdivisions.

45 The agency confirms that it has no file on the Project and the documents given to the complainant were filed on three different files (801/5/7/9 - Subject: Regional Planning, Locality: Denmark, Description: Wishart Place Structure Plan; 857/5/4/1PV4 - Subject: Local Authority, Locality: Albany Shire, Description: General; and 852/5/2/2V9 - Subject: Townsites, Locality: Albany Town, Description: Foreshore Town Centre). The latter holds ministerial correspondence, correspondence from town planners, planners' reports, correspondence with the Shire of Denmark and other related documents. The agency advises that correspondence from Mr Smithson which was unrelated to the Project was found on that file.

46 The agency also confirms that, if there had been any correspondence between the agency and the Minister, such correspondence would have been stored with the agency. The agency submits that, had any of the requested file notes or

46... correspondence existed, they would have been located in the course of the searches made.

47 The agency advises that copies of the three documents given to the complainant have now been placed on file 801/5/1/3PV7 - Subject: Regional Planning, Locality: Great Southern Region, Description: Albany Regional Plan.

48 As I mentioned on page 4 above, searches of files held by the Transport Division were also made. Two further documents were located, both being copies of ministerials and, therefore, outside the scope of the access application and the complaint.

Has the agency now taken all reasonable steps to find the documents?

49 Section 26(1)(a) of the FOI Act requires that an agency must take "*all reasonable steps*" to find the requested documents. On the information currently before me, I consider that the agency has taken all reasonable steps to find the requested documents. In light of the searches and inquiries which the agency has made, I do not require the agency to make further searches and inquiries at this stage.

50 Although the complainant considers that additional documents should exist, there is nothing in the information currently before me to show that they do or should exist.

51 In *Re Doohan and Western Australian Police Force* [1994] WAICmr 13, the former Information Commissioner considered that documents may not be readily found for a number of reasons including misfiling, poor record keeping; ill-defined requests; proliferation of record systems; unclear policies or guidelines; inadequate training in record management and non-existence.

52 However, if an agency is unable to locate requested documents, an adequate statement of reasons may go some way towards reassuring a sceptical applicant. In my view, the minimum requirement is a brief explanation of the steps taken by the agency to satisfy the request. I am satisfied in this instance that you have now been adequately informed of the nature and extent of the searches conducted by the agency and that those searches have been, in the circumstances, reasonable.

Preliminary view

53 In light of the above, my preliminary view is that the agency has taken all reasonable steps to locate the requested documents but additional documents either cannot be found or do not exist. In my view, based on the inquiries made by the agency, it is more likely than not that they do not exist.

54 In light of my assessment, I invite the complainant to reconsider its complaint. If the complainant wishes to withdraw its complaint, please sign and return the attached draft letter confirming that that is the case. Alternatively, the complainant is invited to provide me with relevant information and submissions to show that further documents exist or should exist by 4pm on Wednesday, 25 January 2006.

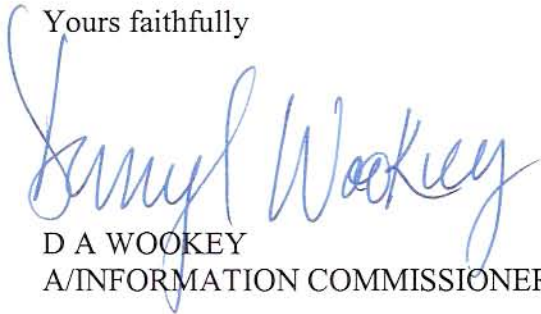
55 After that date, I shall finalise this complaint, if necessary, by publishing my decision in full or in summary form, as appropriate.

Direction

56 Pursuant to s.70(4) of the FOI Act, I direct that, until this matter is finalised, this letter is to be treated as confidential. This letter is not to be released into the public domain. It is provided to the complainant for the purpose of informing it of my preliminary view of this complaint and to give the complainant an opportunity to provide me with further information in support of its claims.

57 If you have any questions, please contact my Legal Officer, Ms Anne Marshall, on 9220 7804 or by e-mail to amarshall@foi.wa.gov.au.

Yours faithfully



D A WOOKEY
A/INFORMATION COMMISSIONER

13 January 2006

Copy to Director-General, Department for Planning and Infrastructure