

SMEDLEY V DEPARTMENT OF BUSINESS, THE ARTS, SPORTS AND TOURISM

FACTS

Smedley made an application to the Department for access to documents relating to an application for a grant by the Fairbairn Control Council for roadworks and an authorisation for a change to the original application. The Department located some documents and provided access to these documents. However, the Department was not able to locate documents relating to the authorisation for a change to the original grant.

Smedley sought an internal review and after the review was told that the requested documents could still not be located.

Smedley applied to the AAT for a review.

The Department opposed the review on the basis that the Department had not refused access to the documents and therefore the AAT had no jurisdiction to review the Department's decision.

ISSUES

Had the Department refused to provide access to the document when it stated that it could not find the requested documents?

If the Department had refused access, was the AAT satisfied that the Department had made all reasonable efforts to locate the requested documents?

FINDING

A failure to refuse access to a document was a refusal to grant access to a document and the AAT therefore had jurisdiction to review the Department's decision.

The AAT was satisfied that all reasonable efforts had been made to locate the documents and the decision of the Department was affirmed.

QUOTE

Professor L J Curtis said:

"A request made under section 14 of the FOI Act to an agency is a request for access to a document of the agency, that is, a document in the possession of the agency. ... The agency has not denied the existence of the 2 documents in question. ..."

The duty of the agency, in response to a request for access is to grant access to the documents in accordance with the request unless the documents are exempt or there is another ground under the Act entitling the agency to refuse access in accordance with the request.

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In my view, a failure to grant access in accordance with a request must be taken to be a refusal to grant access as required by the Act.”

IMPACT

A failure to locate documents and provide them to an FOI applicant is a refusal to provide access to those documents. Otherwise an agency could claim that the requested documents could not be located, and its decision could not be reviewed by the AAT.

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