

Decision D0062013 - Published in note form only

Re Flahive and Western Australia Police [2013] WAICmr 6

Date of Decision: 7 March 2013

Freedom of Information Act 1992: Sections 6, 12(1)(e), 15(1) and 26.

On 4 June 2011, Mr John Anthony Flahive ('the complainant') was involved in an incident at a recreational facility ('the facility') operated by the City of Stirling ('the City'). On that day officers from the Western Australia Police ('the agency') attended the facility and viewed CCTV footage related to the incident. Certain CCTV footage related to the incident was downloaded and provided to the agency officers on a DVD ('the downloaded footage').

On 7 June 2011, the complainant applied to the City under the *Freedom of Information Act 1992* ('the FOI Act') for access to CCTV footage from the facility car park and reception area from 8:30 am to 12 noon on 4 June 2011 ('the requested footage').

The complainant did not pay an application fee when he lodged his access application. Among other things, the complainant was seeking non-personal information. Accordingly, under section 12(1)(e) of the FOI Act, the complainant's application was not valid until the application fee was paid. The application fee was paid on 20 September 2011. On 22 September 2011, the City transferred the application in full to the agency under section 15(1) of the FOI Act.

On 30 September 2011, the agency advised the complainant that the requested footage was available to him outside the FOI Act and, therefore, pursuant to section 6 of the FOI Act, the access procedures under the FOI Act did not apply. Subsequently, on 10 October 2011, the complainant's legal counsel was provided a copy of the downloaded footage, which comprised approximately 10 minutes of footage from one camera, pursuant to the *Criminal Procedure Act 2004*.

The complainant sought internal review of the agency's decision on the basis that additional footage existed within the scope of the access application ('the additional footage'). On internal review, the agency confirmed its initial decision. On 21 December 2011, the complainant applied to the Information Commissioner for external review of the agency's decision on the basis that the additional footage should exist and should be held by the agency.

The Commissioner accepted the complaint as a review of a deemed decision to refuse access to documents under s.26 of the FOI Act. Section 26 provides that an agency may refuse access to a document if the agency is satisfied that all reasonable steps have been taken to find the document and the document cannot be found or does not exist. CCTV footage is a document for the purposes of the FOI Act.

Following receipt of the complaint, the Commissioner's staff made inquiries with the agency and the City about the complaint and the existence of the additional footage. The City advised that on 4 June 2011, at least four cameras were recording footage that fell within the scope of the access application but that only the downloaded footage was provided to the agency. The agency advised that the only footage that it had ever held was the downloaded

footage given to it by the City and provided to the complainant's legal counsel on 10 October 2011. The agency submitted that it never held the additional footage.

After conducting further inquiries and considering the information before him, on 31 January 2013 the Commissioner provided the parties with a letter setting out his preliminary view of the complaint, including detailed reasons for his view. The Commissioner noted that in its decision on internal review the agency had failed to appropriately deal with the issues raised by the complainant about the existence of the additional footage, which formed part of the access application that had been transferred in full to the agency. However, based on the information subsequently provided to the Commissioner by the agency and the City, including information about the footage provided to the agency by the City, the Commissioner's preliminary view was that the agency had taken all reasonable steps to find the additional footage but that it cannot be found or does not exist.

In light of his preliminary view, the Commissioner invited the complainant to reconsider whether he wished to pursue his complaint or to make further submissions to him about why the additional footage should exist. The complainant did not respond despite a further invitation to do so.

Having reviewed all of the information before him, the Commissioner was satisfied that the agency had taken all reasonable steps to find the additional footage but that it cannot be found or does not exist. Consequently, the Commissioner confirmed the agency's decision to refuse access to the additional footage pursuant to section 26 of the FOI Act.