

Decision D0072013 - Published in note form only

***Re Flahive and City of Stirling* [2013] WAICmr 7**

Date of Decision: 7 March 2013

Freedom of Information Act 1992: Sections 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 agency'). On that day Western Australia Police ('WAPOL') officers attended the facility and viewed CCTV footage related to the incident. Certain CCTV footage related to the incident was downloaded and provided to WAPOL officers on a DVD ('the downloaded footage').

On 7 June 2011, the complainant applied to the agency 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 agency transferred the application in full to WAPOL under section 15(1) of the FOI Act.

The complainant asked the agency to review its decision to transfer his access application because, in addition to the downloaded footage provided to WAPOL, other footage existed that was within the scope of the access application. The agency advised the complainant that his application had been transferred in full to WAPOL and any enquiries should be directed to WAPOL.

On 21 December 2011 the complainant applied to the Information Commissioner for external review of the agency's decision to transfer his application to WAPOL. The Commissioner considered that the agency's decision under section 15(1) of the FOI Act to transfer the access application implied that the agency had conducted searches for the requested footage and that it had decided it does not hold them (*Re MacTiernan and Minister for Regional Development* [2009] WAICmr 29). Consequently, the Commissioner dealt with the complaint as a review of a deemed decision of the agency to refuse the complainant access to the requested footage under section 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.

The agency advised the Commissioner that, on 4 June 2011, several cameras were recording CCTV footage that was within the scope of the access application. The agency advised that, while the footage was viewed by its officers, the only footage that was downloaded was the downloaded footage, which was provided to the WAPOL officers. The agency made no record of the details of the downloaded footage and the only copy of the downloaded footage was provided to WAPOL.

The agency further advised that its CCTV footage is recorded to, and stored on, a hard drive that automatically overwrites the CCTV footage 30 days after it is recorded. If the agency wishes to retain a copy of particular CCTV footage, the agency downloads the relevant footage to a DVD. If footage is not downloaded, it is automatically overwritten after 30 days. The agency submitted that on 20 September 2011, the date the complainant paid the required application fee, the requested footage had been automatically overwritten and no longer existed.

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 expressed concern that the agency had not taken steps to protect the requested footage once it was aware of the complainant's intention to make an access application. He also expressed the view that the agency should have given the complainant more timely written advice that his application was invalid and the consequence of not making a valid application would be that the CCTV footage may be automatically overwritten after 30 days. The Commissioner also expressed concern that the agency had failed to make a record of the CCTV footage given to WAPOL. However, the Commissioner noted that the agency has subsequently instituted policies and procedures that would limit the potential for similar problems to occur in the future.

Although the Commissioner expressed concern about the process followed by the agency, it was his preliminary view that the agency had taken all reasonable steps to find the requested 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 requested 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 requested footage but that it cannot be found or does not exist. Consequently, the Commissioner confirmed the agency's decision to refuse access to the requested footage pursuant to section 26 of the FOI Act.