

Decision D0182015 – Published in note form only

***Re McCauley and City of Stirling* [2015] WAICmr 18**

Date of Decision: 1 October 2015

Freedom of Information Act 1992: section 26

On 4 November 2014, Mr David and Mrs Terri McCauley (**the complainants**) applied to the City of Stirling (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to copies of documents relating to plans for a retaining wall between their property and two different adjoining properties. The documents sought included plans and building approvals made to the agency by the complainants' neighbours.

By notice of decision dated 29 December 2014 the agency decided to give access in full to 12 documents; access to edited copies of 31 documents with information deleted under clause 3(1) of Schedule 1 to the FOI Act; and access by way of inspection to 23 documents. The complainants applied for internal review of the agency's decision on the ground that further documents should exist. On internal review the agency confirmed its decision.

The complainants applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. Following receipt of the complaint, the Commissioner obtained a copy of the FOI file maintained by the agency in respect of the complainants' access application. The Commissioner obtained further information from the agency in relation to the searches it had conducted to locate the requested documents. As a result, the Commissioner's Investigations Officer informed the parties of her initial view that the agency had taken all reasonable steps to find the requested documents but that they cannot be found or do not exist.

The complainants remained dissatisfied and maintained their claim that additional documents should exist.

Section 26 of the FOI Act provides that an agency may refuse access to a document if it is satisfied that 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 that, in dealing with section 26, the following questions must be answered. First, 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 those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to locate those documents.

On 18 August 2015, after considering all of the information currently before the Commissioner, the parties were advised in writing that it was the Commissioner's preliminary view that the agency's decision to, in effect, refuse access to additional documents under section 26 of the FOI Act was justified. That is, the Commissioner was satisfied that all reasonable steps had been taken by the agency to locate the documents and that any additional documents are either in the agency's possession but cannot be found, or do not exist. The complainants were invited to withdraw their complaint or to provide the Commissioner with further submissions relevant to the matter for the Commissioner's consideration.

The complainants did not accept that view and made further submissions. After considering the complainants' further submissions the A/Commissioner was not persuaded from the Commissioner's preliminary view. Accordingly, after considering all of the information before her, the A/Commissioner confirmed the agency's decision to refuse access to documents under section 26 of the FOI Act on the basis that those documents either cannot be found or do not exist.