

Decision D0322009 – Published in note form only

***Re Mallet and City of Perth* [2009] WAICmr 32**

Date of decision: 26 November 2009

Freedom of Information Act 1992: Section 26, clause 3 of Schedule 1, Personal Information

By letter dated 25 December 2008, Mr Desire Mallet ('the complainant') applied to the City of Perth ('the agency') for access to documents containing personal information about him in respect of:

- four incidents involving his interaction with certain agency officers and contractors of the agency; and
- his 'presence' at a location and time which he described.

The agency gave the complainant access to various documents that related to those two issues, but refused him access to one document, being certain CCTV footage that it identified as relating to the complainant's presence at the location he described. The agency claimed that the CCTV footage is exempt under clause 3(1) of Schedule 1 to the FOI Act.

A series of inquiries were made with the agency about the searches it had undertaken and in respect of the CCTV footage. In particular, enquiries were made as to whether it would be practicable to give the complainant an edited copy of the CCTV footage. In the event, the agency did not identify any further documents; it maintained its position that the CCTV footage is exempt under clause 3(1); and it advised that it was not practicable to give the complainant access to an edited version of the CCTV footage.

After considering the material then available to him, an officer assisting the Information Commissioner ('the Commissioner') informed the complainant of his view of the two issues in dispute in this complaint, including his reasons.

The two issues are:

1. Whether, pursuant to s.26(1) of the FOI Act, the agency had taken all reasonable steps to find the requested documents; and
2. Whether the agency should give the complainant access to the particular CCTV footage that was identified by the agency as being within the scope of the access application.

The Commissioner's officer advised the complainant that, in his view:

1. The agency had taken all reasonable steps to locate the requested documents but that additional documents either do not exist or cannot be found; and
2. The complainant could not be conclusively identified from the CCTV footage.

The complainant was invited to reconsider whether he wished to pursue his complaint. He confirmed that he wished to pursue the matter and made a series of further submissions to the Commissioner.

With respect to the first issue, the Commissioner was satisfied from the information before him that the agency had taken all reasonable steps to locate the requested documents but that they either cannot be found or do not exist. In light of that, the Commissioner did not require the agency to conduct any further searches or inquiries.

With respect to the second issue, the Commissioner examined the CCTV footage and he was not satisfied that the image of a person that appears on that footage is an image of the complainant.

It appeared that the agency originally identified the CCTV footage as within the scope of the application on the basis of searching for the image of a male person of a particular appearance (as described by the complainant) who was in a particular location at a particular time (as described by the complainant). The fact that the CCTV footage was identified by the agency under those circumstances is not sufficient of itself to establish that it falls within the scope of the access application.

In order for the CCTV footage to be personal information about the complainant, his identity must be apparent from that footage or be reasonably ascertainable from that information. Although the footage appears to show a male person matching the description given by the complainant, the angle, distance and clarity of the image produced from the CCTV does not allow for the person to be identified. Since the complainant's identity was not apparent and cannot be reasonably ascertained from the CCTV footage, that information does not consist of personal information about the complainant and, therefore, that information does not fall within the scope of the access application.

The Commissioner confirmed the agency's deemed decision under s.26 of the FOI Act, to refuse access to the requested documents on the ground that they cannot be found or do not exist. The Commissioner also varied the agency's decision to refuse access to the CCTV footage under clause 3(1) of Schedule 1 to the FOI Act, because the Commissioner found that it is outside the scope of the access application, as it does not contain personal information about the complainant.