

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2019019
Decision Ref: D0012022**

Participants:

Mark McLerie
Complainant

- and -

City of Melville
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – CCTV footage of Council meeting – agreed scope of access application – section 26 – documents that either cannot be found or do not exist

Freedom of Information Act 1992 (WA): section 26

Freedom of Information Act 1982 (Cth)

State Records Act 2000 (WA)

Chu v Telstra Corporation [2005] FCA 1730

Re Doohan and Western Australia Police Force [1994] WAICmr 13

Re Anderson and Water Corporation [2004] WAICmr 22

DECISION

The agency's decision is confirmed. I find that all reasonable steps have been taken by the agency to locate the requested documents and I am satisfied under section 26 of the *Freedom of Information Act 1992 (WA)* that further documents either cannot be found or do not exist. The agency's decision is justified.

Catherine Fletcher
INFORMATION COMMISSIONER

8 February 2022

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Melville (**the agency**) to refuse Mr Mark McLerie (**the complainant**) access to documents under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**).

BACKGROUND

2. On 22 November 2018, the complainant applied to the agency for access to two types of documents being CCTV and audio recordings. Specifically, the complainant sought:

... access to any and all audio and visual recordings of the 6 November 2018 Council meeting from the time immediately (sic) prior to me entering the City's offices through to the time the Council chamber was fully vacated after the Council meeting.

For the sake of clarity this includes, but not limited to, the camera located in the area before the Council chambers that is located directly above the area where the tea and coffee station is normally set-up.

You will recall, as recorded in the meeting minutes that I was the only member of the public present that evening. [A named individual] from the Melville Times was also present. I am sure [that the named individual] would be happy to consent to the release of any recordings that may identify him being released under FOI. In the event [that the named individual] does not consent I believe that the footage ... can be easily redacted.

3. By letter dated 21 December 2018, the agency wrote to the complainant and requested that he reduce the scope of his access application in relation to the request for the CCTV footage. The agency foreshadowed that dealing with the access application for CCTV footage would divert a substantial and unreasonable portion of the agency's resources as described in section 20 of the FOI Act. In that letter the agency also provided the complainant with a copy of the audio recording from the meeting.
4. Although the agency used the heading 'decision' in the body of its letter, as events unfolded in relation to this access application, I accept that the agency did not in fact make a formal decision, in relation to the CCTV footage at this time. Therefore, I will refer to this letter as a **purported decision**.
5. I accept that there was some confusion arising out of the agency's use of the word 'decision' in the purported decision, which resulted in additional correspondence from both the complainant and the agency. I have not considered this correspondence as I do not consider it relevant to the central issues for my consideration in this decision.
6. By email and letter dated 22 December 2018, the complainant sought an internal review of the agency's purported decision of 21 December 2018. The complainant reduced the scope of his application for CCTV footage to:

...video from the six cameras with a field of vision confined to the Council chambers from circa 6.00pm, the time just before I entered the Council chambers that night, through to the end of the Council meeting.

7. In the agency's notice of decision dated 4 January 2019, it confirmed its decision to give the complainant access to the audio recording of the relevant meeting. In relation to the complainant's request for CCTV footage, the agency made a decision under section 20 of the FOI Act to refuse access on the basis that the work involved in dealing with that part of the access application would divert a substantial and unreasonable portion of the agency's resources. In reaching its decision the agency considered that giving access to the CCTV footage would reveal personal information as described in clause 3 of Schedule 1 to the FOI Act (**clause 3**). The agency also took into account the work involved in editing.
8. By email dated 7 January 2019 the complainant requested an internal review of the agency's decision and on 11 January 2019 the agency issued its internal review decision in relation to both the audio and CCTV access applications.
9. As the decision in relation to the audio recording is not relevant to this external review, I will not detail it here. In relation to the complainant's application for CCTV footage, the agency varied the decision to refuse access. The agency provided the complainant with an edited copy of CCTV footage from one camera for a defined period of time (18:09:13 to 18:14:47). The agency advised it would provide edited access to footage for that period of time from other cameras if the complainant agreed to pay for the editing of that material. The agency refused access to the CCTV footage of the council chamber from 18:00 to 19:50 on the basis that the information consists of personal information that is exempt under clause 3. The agency decided that the task of editing the CCTV footage to remove third party personal information would divert a substantial and unreasonable portion of the agency's resources away from its other operations, under section 20(2) of the FOI Act.
10. On 11 January 2019 the complainant applied to me for external review of the agency's decision to refuse access to the requested CCTV footage.

REVIEW BY THE INFORMATION COMMISSIONER

11. Following receipt of this complaint, the agency produced to me its FOI file maintained in respect of the complainant's access application together with a copy of certain CCTV footage on a USB electronic storage device (**USB**).
12. By email dated 7 June 2019, my Manager Complaints summarised his understanding of the scope of the issues then in dispute and sought confirmation from the complainant that my officer's understanding was accurate. In that email, my officer advised the complainant as follows:

I have been asked to review this matter, which relates to a request for the audio and visual recordings of a meeting of the Council of the City of Melville (the agency).

In particular, your access application relates to 6 November 2018 Meeting of Council

In the agency's decision of 4 January 2019, the agency gave you access to audio part of your request.

Therefore, the only remaining aspect of this matter that remain in dispute relates to the visual (CCTV) aspect of the request.

Although I am not entirely certain, I understand that you have indicated to the agency that you will limit your request to that part of the CCTV footage that excludes private individuals and you now only seek access to the CCTV footage that records the actions of the Councillors of the agency and the administrative support staff of the agency. That is, officers of the agency as that term is defined.

If I have accurately summarised this matter, there appears to be significant scope to resolve this matter by way of a negotiated outcome. However, before I put a proposal to the agency, I seek your confirmation that the above accurately summarises your current position in this matter.

After I have your response, I will be in a better position to consider how best to resolve this matter.

13. By email dated 10 June 2019, the complainant confirmed that my officer's understanding was correct. The complainant also confirmed that the agency had given him an edited copy of CCTV footage from one camera for a defined period of time prior to the meeting commencing which showed the complainant taking photographs of the location of the fixed cameras that had then recently been installed in the Council Chamber and the complainant's interaction with an officer of the agency shortly thereafter.
14. At this time, my office was dealing with five external reviews involving CCTV footage held by the agency. In addition to this matter, which relates to the complainant as an individual, the other four matters related to applications made to the agency by an organisation that the complainant was closely associated with at that time and the complainant communicated with the agency on behalf of that organisation.
15. This office dealt with the four other matters together and this matter separately. However, it became apparent that the agency was dealing with all five matters on the basis that the complainant was the relevant contact for all five matters. Therefore, the agency produced documents to this office in this matter together with documents relating to one of the other four matters.
16. Having examined the CCTV footage provided to this office, on 6 December 2019, my Manager Complaints' preliminary assessment was that the agency's position in relation to excluding personal information about officers of the agency may not be justified. Therefore, my officer invited the agency to reconsider its position with a view to disclosing additional CCTV footage. At that time, my officer's assessment was given to the agency in respect of the other four matters and not this matter.
17. On 18 December 2019, an officer of the agency advised my officer that the agency had reconsidered the matter and proposed to give access to additional CCTV footage. However, the agency officer also advised that the agency had not retained a copy of the

CCTV footage that had been provided to this office and requested that the USB that contained the relevant CCTV footage be returned to the agency to enable it to further process the matters.

18. On 23 December 2019, the copy of the CCTV footage provided to this office on the USB in this matter was returned to the agency as it was stored on that device together with another matter. This office did not create a separate copy of the material on the USB before it was returned to the agency.
19. On 5 May 2020, the agency advised this office that it had provided the complainant with access to additional CCTV footage relating to the council meeting on 6 November 2018.
20. Based on the advice provided to this office by the agency on 5 May 2020, on 12 May 2020, my Manager Complaints sent the complainant an email advising him that he had received advice from the agency that the agency had given the complainant full access to the CCTV footage relating to the Council meeting of the agency held on 6 November 2018. My officer understood that to be the only document/issue remaining in dispute in this matter, and therefore, there was nothing further required of this office on external review. My officer also advised the complainant that the external review before me was considered finalised and that the file would be closed.
21. By email dated 12 May 2020, the complainant informed my office that he did not consider that the information provided to him by the agency satisfied his access application. In that email, the complainant forwarded an email that he had sent to the agency on 5 May 2020, which outlined his concerns with the documents he had been given access to. Those concerns were as follows:
 - The agency did not provide the footage from all six cameras rather only three (from Channels 26, 27 and 37).
 - The agency did not provide any footage from when the complainant entered the room from any cameras.
 - The complainant was not sure why the agency provided so many disaggregated files from any given camera.
22. Between June 2020 and November 2020, my Manager Complaints emailed the agency on multiple occasions seeking information about the status of this matter. In particular, my officer requested that the agency respond to the submissions that the complainant made in his email dated 5 May 2020 in respect of the so-called missing CCTV footage.
23. On 23 November 2020, the agency wrote to my Manager Complaints and advised that:

The major portions of CCTV relating to this matter has been released to Mr McLerie within the [FOI] Act. The release ... were copies of material originally saved from CCTV storage medium and sent to [the Office of the Information Commissioner] less images of the public gallery as agreed with Mr McLerie.

... the CCTV storage server for the City Council Building is routinely refreshed and deleted (as ephemeral records) at 6 weekly intervals unless

images are retrieved and saved for a business purpose eg: FOI application/review, incident investigation etc. For this reason I am unable to verify if other images exist in the original storage medium. Further, I am aware there is matter saved in the records system ECM and these were used to release additional images to Mr McLerie outside the Act by a City Governance Officer but I have not considered these for release under the [FOI] Act.

24. By reply email dated 23 November 2020, my Manager Complaints requested that the agency confirm whether it held any additional documents as described by the complainant in his email dated 5 May 2020.

25. By email dated 26 November 2020, the agency's FOI Coordinator advised my office that:

[He had] asked IT to recover the network drive of a retired officer to ascertain if he has retained the original CCTV of this meeting. If it still exists I will review the old CCTV footage and verify Mr McLerie's claims.

Thus far there are no other copy (sic) has been kept in the Record System (apart from the FOI copy) and/or by the CCTV administrator.

26. By email dated 2 December 2020, the agency advised that it searched the recovered drive of a former officer, as an email from that officer indicated that a copy of the CCTV footage had been downloaded. The agency advised that no further copies of the CCTV footage had been located on that drive. The agency suggested that '[i]t is now plausible that while [the officer] may have downloaded, the CCTV sometime later may have been deleted ...'

27. By email dated 20 January 2021 my officer asked the agency to again provide to my office a copy of the documents produced to the complainant through the FOI application (that is a copy of the CCTV footage on the USB that this office returned to the agency on 23 December 2019).

28. On 4 June 2021, my Manager Complaints sent a further email to the agency regarding the complainant's 5 May 2020 email to the agency and the copy of the CCTV footage initially provided to this office on 11 March 2019 (and returned to the agency on 23 December 2019).

29. By email dated 9 June 2021, the agency advised that it had not been able to locate the USB. By further email dated 11 June 2021, the agency advised that the USB that had stored the copy of the CCTV footage provided to my office were 'reused after the contents [were] transferred to a network drive...' The agency advised that it could provide this office with a copy of the CCTV footage from the agency's network drive.

30. My officers sent a series of emails to the agency in June 2021 and July 2021 to facilitate the agency providing a copy of the CCTV footage from its network drive to this office by electronic file transfer.

31. On 27 July 2021, the agency transferred CCTV files to this office. The files transferred included 18 files from channel 27 and two files from channel 34.
32. On 9 November 2021, after considering all of the information before me, and taking into account the searches and inquiries undertaken by the agency, I provided the parties with my preliminary view of this matter. For the reasons set out in my letter, it was my preliminary view that the agency's decision to refuse access to documents (additional CCTV footage) on the basis that the documents cannot be found, or do not exist, as described in section 26 of the FOI Act, is justified.
33. In light of my preliminary view, the complainant was invited to reconsider whether he wished to pursue this matter. If the complainant accepted my preliminary view, the matter would be at an end. However, if the complainant did not accept my preliminary view, he could provide any further submissions in writing that are relevant to the matter for my determination.
34. By email dated 29 November 2021, the complaint confirmed that he wished to pursue this matter and he provided further submissions in support of his claims.

ISSUE REMAINING IN DISPUTE

35. When this matter first came before me, the agency had refused access to all of the requested CCTV footage. However, during the external review process, the agency gave the complainant access to some CCTV footage that it had found. The complainant maintained that there should be additional CCTV footage that the agency had not found.
36. Therefore, the remaining issue for me to determine is whether there are reasonable grounds to believe that the additional CCTV footage from other cameras exist in relation to the 6 November 2018 Council meeting and, if necessary, whether the agency has taken all reasonable steps to find such documents as required by section 26 of the FOI Act (**section 26**).

SECTION 26 – DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

37. Section 26 (1) provides that:
 - (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
 - (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency is satisfied that the document –*
 - (i) *is in the agency's possession but cannot be found; or*
 - (ii) *does not exist.*
38. 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 find those documents.

39. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary. I do not consider that it is generally my function to physically search for requested documents on behalf of a complainant.

THE COMPLAINANT'S SUBMISSIONS

40. The complainant's submissions, in so far as they are relevant to his claims that additional documents exist, are set out in his emails of 5 May 2020 and 29 November 2021. In summary, the complainant submits:

- There are six cameras in the council meeting room, and he has only been provided with footage from three cameras.
- He has not been provided with footage from when he entered the council meeting room.
- He doesn't understand why the agency provided footage from each of the three cameras in numerous different files.
- The records did exist.
- The agency has an obligation to identify and secure the requested documents.
- It should not have been hard for the agency to properly download the relevant CCTV footage.
- It appears that the agency has disposed, deleted or concealed records in breach of section 110 of the FOI Act.
- This is not the first instance of the agency having issues with providing full access to visual and/or audio of Council meetings.

41. The complainant also submitted that:

- The agency has not provided all of the audio requested.
- The agency sought to impose excessive charges.
- There were two third parties who had consented to having their personal information released.
- The agency incorrectly asserted at the 18 June 2019 Council meeting that the footage taken was security footage and not CCTV footage and there were special provisions in the FOI Act to deal with that.
- The agency had discretion to provide the audio visual at the time, but obstructed access to it.
- The agency now, after much lobbying, provided audio recordings on-line free of charge and live streams the audio visual of the meeting. This was done without any change to the legislation. This demonstrates that the agency acted unreasonably by not providing the audio visual in a timely manner in response to a simple FOI request.

42. The complainant's submissions summarised at paragraphs 40 and 41 were considered. However, given that the submissions at paragraph 41 either relate to a matter no longer

in dispute or relate to the administrative processes of the agency, much of which has now changed, I do not propose to consider them further in this decision.

THE AGENCY'S SUBMISSIONS

43. Through its correspondence with this office during the review process, the agency submits as follows:
- 'Major portions' of the CCTV footage have been released to the complainant.
 - The agency has provided the complainant with footage that was initially saved from the 'CCTV storage medium' and sent to my office.
 - With the agreement from the complainant, images from the public gallery in the 6 November 2018 meeting were not provided to my office.
 - The CCTV footage is only retrieved and saved for business purposes such as an FOI application or an investigation. Otherwise, the agency keeps records on its CCTV storage server as ephemeral records for approximately six weeks.
 - The agency understands that images were released to the complainant outside of the FOI Act, and these images were not considered as part of this FOI application.
 - The agency was unable to locate any other copy of the CCTV footage on the agency's record system, other than the copy that was produced in relation to this FOI application.

SEARCHES CONDUCTED

44. The agency undertook searches of:
- The agency's CCTV storage server.
 - USBs that the CCTV was initially saved to (and then produced to my office).
 - The recovered drive of a former officer of the agency who was involved in the early stages of the complainant's access application in this matter.
 - The agency's record keeping system.

CONSIDERATION

45. The first question for my consideration is whether there are reasonable grounds to believe that further documents exist or should exist in the possession or under the control of the agency, within the scope of your access application.
46. I have examined the agency's file in relation to the matter, as well as the submissions made by both parties and the additional documents that have been provided to the complainant during the external review.
47. I accept that as there are six cameras in the council meeting room and that the complainant has been provided with footage from three cameras it is reasonable to expect that at the time of the meeting, and for a period of time thereafter, that there would have been reasonable grounds to believe that further documents exist, or should exist.

48. However, from the information provided by the agency to my office, I understand that despite the agency taking various steps to locate those documents in 2020 and 2021, any documents from the other three cameras cannot now be found.
49. The FOI Act does not require agencies to guarantee that their record-keeping systems are infallible. In *Re Doohan and Western Australia Police Force* [1994] WAICmr 13 at [28], the former Commissioner recognised that documents may not be readily found for a number of reasons including misfiling; poor record keeping; ill-defined requests; proliferation of record systems; unclear policies or guidelines; inadequate training in record management; or simply that the documents do not exist. At the same time, the Federal Court in *Chu v Telstra Corporation Ltd* [2005] FCA 1730 at [35] has commented, in relation to the provision in the *Freedom of Information Act 1982* (Cth) that corresponds to section 26 of the FOI Act, that the relevant provision is not meant ‘to be a refuge for the disordered or disorganised.’
50. Although it is not my role to examine in detail an agency’s record-keeping practices, part of my function is to ensure that agencies are aware of their responsibilities under the FOI Act and to provide assistance to them on matters relevant to the Act. In my view, those functions include highlighting deficiencies in an agency’s record-keeping practices that may impact upon the proper functioning of the FOI Act, where such deficiencies are uncovered in the course of an external review.
51. In *Re Anderson and Water Corporation* [2004] WAICmr 22 at [28], the former A/Commissioner said in relation to the operation of section 26 of the FOI Act:
- One of the stated objects of the FOI Act is “... to make the persons and bodies that are responsible for State and local government more accountable to the public” (s.3(1)(b)). One of the means of achieving that accountability is the creation of a general right of access to State and local government documents (ss.3(2)(a) and 10). If government decisions – particularly those which directly affect individuals – and the processes by which those decisions were made are not properly documented, the accountability that the FOI Act is designed to further is significantly diminished. A lack of proper records is also an inadequate administrative process which is inconsistent with the requirement of the State Records Act 2000 that each agency have, and comply with, a record-keeping plan that, among other things, ensures that the records kept by an agency properly and adequately record the performance of its functions (s.16(2)(b)).*
52. Additionally, accountability cannot be achieved, and a general right of access to documents is undermined, if agencies’ processes and searches are not sufficient to enable them to locate documents in their possession.
53. I note the importance of good record keeping systems in agencies and the need to ensure that officers of agencies are trained to conduct comprehensive searches of those systems - particularly the electronic systems - to ensure the proper functioning of the FOI Act.
54. I am mindful that at the time of first dealing with this matter, the agency had only recently installed the CCTV cameras and the system associated with those cameras. It is not clear what specific record-keeping practices were in place at that time. However,

I now understand that the manner in which the agency deals with CCTV footage has changed.

55. In this case, I am unable to conclude whether the additional CCTV footage was ever identified by the agency in the first instance for the purpose of the decisions made by the agency. Therefore, I am also unable to confirm whether the agency provided the additional CCTV footage to this office.
56. During the course of this external review, the agency undertook further searches for documents within scope, and provided a more detailed explanation of the searches it had undertaken.
57. Having considered all of the information before me, and taking into account the further searches undertaken by the agency, I am satisfied that the agency has now taken all reasonable steps to locate all of the requested documents and that although further documents of that kind (CCTV footage from three cameras) may exist, or may have existed for a period of time, they cannot now be found.

DECISION

58. I find that all reasonable steps have now been taken by the agency to locate documents and I am satisfied under section 26 of the FOI Act that further documents either cannot be found or do not exist. The agency's decision is justified.
