

Decision D0032024 – Published in note form only

Re Carrington and Western Australia Police Force [2024] WAICmr 3

Date of Decision: 28 February 2024

Freedom of Information Act 1992 (WA): section 26

In October 2022, Daniel Carrington (**the complainant**) applied to the Western Australia Police Force (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to CCTV footage that recorded a particular statement he made to the agency at a police station in 2014 (**the requested document**).

By notice of decision dated 5 December 2022, the agency decided to refuse access to the requested document, under section 26 of the FOI Act, on the ground that the requested document does not exist.

The complainant applied for internal review of the agency’s decision and the agency confirmed its initial decision.

In February 2023, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. The complainant maintained that the agency held the requested document.

The agency provided the Commissioner with its FOI file maintained in respect of the complainant’s access application. One of the Commissioner’s officers made inquiries with the parties and obtained additional information.

On 8 June 2023, the officer provided the complainant with his assessment of the matter, which was that the Commissioner was likely to consider, on the information then before this office, that the agency’s decision was justified. The complainant did not accept the officer’s assessment and provided further submissions.

Section 26 provides that an agency may refuse access to a document if 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.

As observed in *Re Boland and City of Melville* [1996] WAICmr 53 at [27], the question is not whether an agency has taken every possible step to locate documents, but whether it has taken all reasonable steps.

The adequacy of an agency’s efforts to locate documents is to be judged by having regard to what was reasonable in the circumstances: see *Re Leighton and Shire of Kalamunda* [2008] WAICmr52 at [85] and *Re Veale and City of Swan* [2012] WAICmr 12.

The agency submitted that CCTV footage at the relevant police station would have been recorded over after 90 days unless a police officer had asked (by email) for the footage to be downloaded onto a secure hard drive; that there was no way of determining whether such a request had been made in this case at the relevant time (that is, in 2014), noting that email requests of this kind made at the relevant police station in 2014 are no longer available; and that, even if such a request had been made, the hard drive that the footage would have been downloaded onto had suffered a system malfunction in 2020, which had resulted in the loss and irretrievability of all of the data stored on the hard drive. The Commissioner accepted the agency's submissions.

The complainant contended that the agency has the ability to recover data that may have been overwritten or destroyed and that the agency should conduct additional searches for the requested document by way of a data recovery service. The complainant advised that he would pay for a data recovery service to forensically examine the relevant hard drives that may have held the requested document.

The Commissioner considered that requiring the agency to conduct a forensic examination of the relevant hard drives, as submitted by the complainant, was excessive in the circumstances and went beyond 'all reasonable steps'. The Commissioner accepted that, if there was evidence before her to suggest that the requested document had been deleted or destroyed in order to prevent the agency from giving access to it, 'all reasonable steps' might include a forensic examination of the agency's hard drives: see for example, *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [98]-[99]. However, there was no such evidence before the Commissioner in this matter.

The agency advised that the only possibility of the requested document existing was if a disk or data storage device holding the CCTV footage had been placed in the relevant hard copy 'Crime File', which would now be stored in 'Archives'. The agency retrieved the file from Archives and did not locate a copy of the CCTV footage.

After considering all of the material before her, including the searches undertaken by the agency and the complainant's further submissions, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate the requested document and that the requested document either could not be found or does not exist.

Accordingly, the Commissioner found that the agency's decision to refuse the complainant access to the requested document under section 26 of the FOI Act is justified. Therefore, the Commissioner confirmed the agency's decision.