

Decision D0072023 – Published in note form only

Re Lee and Department of Justice [2023] WAICmr 7

Date of Decision: 30 June 2023

Freedom of Information Act 1992 (WA): section 26

On 25 January 2022, Jeffrey Lee (**the complainant**) applied to the Department of Justice (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents, including metadata, relating to the enforcement or collection of a fine imposed on 20 April 2015 on the complainant's company, Kingsfield Holdings Pty Ltd (**Kingsfield**), under the *Food Act 2008 (WA)*.

As the agency did not give the complainant its decision within the permitted period allowed under the FOI Act, the agency was deemed to have made a decision to refuse access to the requested documents. On 24 March 2022, the complainant applied to the agency for an internal review of its deemed decision. The agency did not give the complainant an internal review decision within the permitted period. Therefore, under section 43 of the FOI Act, the agency was taken to have confirmed its deemed decision to refuse access.

On 11 April 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's deemed decision.

The Commissioner required the agency to complete the decision-making process and to provide the complainant with its decision on access to the requested documents.

By decision dated 14 June 2022, the agency decided to give the complainant access to two documents. Additionally, the agency gave the complainant copies of documents it had provided in response to previous access applications made by the complainant requesting access to similar documents.

The complainant indicated to the Commissioner's office that he was dissatisfied with the agency's decision and submitted that further documents relating to the enforcement of the fine imposed on Kingsfield, coming within the scope of the access application, had not been identified by the agency (**the further documents**). That was, in effect, a claim that the agency had refused the complainant access to the further documents under section 26 of the FOI Act (**section 26**).

One of the Commissioner's officers sought further information from the complainant in support of his contention that the further documents exist and are held by the agency.

On 9 June 2023, following further inquiries with the complainant, the officer provided the complainant with her initial assessment of the matter. It was the officer's assessment that the Commissioner was likely to consider, on the information then before this office, that the agency's decision to refuse the complainant access to the further documents under section 26, on the ground that those documents cannot be found or do not exist, was justified.

The complainant was invited to accept the officer's initial assessment or to provide additional submissions relating to the issues in dispute for the Commissioner's consideration. The

complainant advised that he did not accept the officer's assessment, but did not make any additional, relevant 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.

The complainant referred to an entry in the agency's Fines Enforcement Registry database as evidence that the further documents exist and are held by the agency. However, the Commissioner observed that the significance of the entry in relation to the issue regarding the existence of documents concerning the enforcement of the fine imposed on Kingsfield had previously been considered by the Commissioner and the Supreme Court of Western Australia: see *Lee v Department of Justice* [2020] WASC 105 and *Lee v Department of Justice* [2021] WASC 119.

Having reviewed all of the material before her, the Commissioner was satisfied that there were no reasonable grounds to believe that the further documents exist, or should exist.

Accordingly, the Commissioner found that the agency's decision to refuse access to the further documents under section 26 of the FOI Act, on the ground that those documents either cannot be found or do not exist, is justified. Therefore, the Commissioner confirmed the agency's decision.