

Decision D0112022 – Published in note form only

Re Ellis and Department of Justice [2022] WAICmr 11

Date of Decision: 30 September 2022

Freedom of Information Act 1992 (WA): section 26

On 8 June 2021, Rockwell Ellis (**the complainant**) applied to Acacia Prison under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to certain documents regarding telephone calls he made during a specified date range while incarcerated at a particular prison.

Following discussions with the complainant, the scope of his access application was clarified as being a list of the telephone calls he made at the prison within the specified date range (**the requested document**).

On 23 June 2021, the complainant's access application was transferred to the Department of Justice (**the agency**) under section 15(1) of the FOI Act.

By notice of decision dated 12 July 2021, the agency decided to refuse access to the requested document, under section 26 of the FOI Act, on the ground that the requested document either cannot be found or does not exist.

The complainant sought internal review of the agency's decision and maintained his claim that the agency held the requested document. The agency conducted further searches but did not locate the requested document. The agency confirmed the initial decision.

On 25 August 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision and provided material in support of his claim that the requested document exists and is held by the agency. The agency provided the Commissioner with its FOI file maintained in respect of the complainant's access application.

After examining the agency's FOI file and considering the complainant's submissions, the Commissioner's office made further inquiries with the parties and unsuccessfully attempted to resolve the matter informally.

On 11 August 2022, after considering the material then before her, the Commissioner advised the parties of her preliminary view, which was that the agency's decision to refuse access to the requested document under section 26 was justified.

The complainant did not accept the Commissioner's preliminary view and made further submissions. After considering all the information before her, the Commissioner was not dissuaded from her preliminary view.

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.

In the course of dealing with the complainant's access application, the agency conducted searches for the requested document in its Prisoner Telephony System (PTS) and did not locate the requested document. During the external review, the complainant claimed that the relevant telephone calls were 'officer-initiated' and therefore may not be recorded in the PTS. The Commissioner considered that the material the complainant provided lent weight to his claim.

The agency's *Commissioner's Operating Policy and Procedure 7.1 (the COPP)*, which is publicly available on the agency's website, provides that officer-initiated calls must be recorded on the prisoner's offender notes on the agency's Total Offender Management Solution (TOMS): see section 9.7.2.

On the material before her, the Commissioner accepted it was more likely than not that the complainant made officer-initiated calls from the relevant prison in the specified date range. The Commissioner considered that it was reasonable to expect that the relevant telephone calls would be recorded in the complainant's offender notes in TOMS and, therefore, accepted that there were reasonable grounds to believe the requested document should exist and should be held by the agency.

The agency conducted searches in the complainant's offender notes in the TOMS database and did not locate the requested document. As a result, the Commissioner noted that it appeared that a record of the complainant's officer-initiated calls in the specified date range was not created, as required by section 9.7.2 of the COPP.

The Commissioner observed that, although there may be reasonable grounds to believe the requested document should exist, it appeared that the requested document does not exist, which may be attributable to inadequate record keeping on the agency's part. The Commissioner drew this apparent deficiency in the agency's record keeping to the agency's attention.

After considering all of the material before her, including the searches conducted by the agency, the Commissioner was satisfied that the agency has taken all reasonable steps to locate the requested document.

Accordingly, the Commissioner confirmed the decision of the agency to refuse the complainant access to the requested document under section 26 of the FOI Act on the ground that it either cannot be found or does not exist.