

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

**File Ref: F2007076
Decision Ref: D0032008**

Participants:

Addisons
Complainant

- and -

**Racing and Wagering Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – board report – clause 6(1) – opinion and advice obtained in the course of and for the purpose of the deliberative process of the agency – public interest factors for and against disclosure.

Freedom of Information Act 1992: Sections 3(1), 10(1) and (2); Clauses 4(2), 5(1), 6(1), 12(a); Schedule 1; Schedule 2.

Betting and Racing Legislation Amendment Act 2006

Racing and Wagering Western Australia Act 2003

Casino Control Act 1984

Casino (Burswood Island) Agreement Act 1985

Public Sector Management Act 1994

Statutory Corporations (Liability of Directors) Act 1996

Corporations Act 2001

Betting Control Act 1954

Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588

Re Ravlich and Building and Construction Industry Training Fund Board [1999]
WAICmr 45

Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs
[1993] QICmr 2; 1 QAR 60

DECISION

The decision of the agency to refuse access under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992* is set aside. I find that the disputed document is not exempt.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

1 February 2008

REASONS FOR DECISION

BACKGROUND

1. This complaint arises from a decision of Racing and Wagering Western Australia ('the agency') to refuse Addisons, a law firm ('the complainant'), access to documents under the *Freedom of Information Act 1992* ('the FOI Act'). I understand the complainant to say that it is not acting on behalf of any other party, including Betfair Pty Ltd.
2. Betfair Pty Ltd is an Australian company jointly owned by the Sporting Exchange Ltd (Betfair's parent company in the United Kingdom) and Publishing and Broadcasting Ltd. It is an online betting exchange which allows gamblers to bet at odds set and requested by other gamblers rather than by a bookmaker. The disputed document in this matter contains information about Betfair Pty Ltd.
3. On 12 October 2006, the complainant applied to the agency for access to documents - restricted to those created after 11 October 2004 - as follows:
 - “(a) *All documents ... relating to the operation, use of and/or participation in betting exchanges.*
 - (b) *All documents ... relating to requests or approaches made to RWWA by:*
 - (i) *the Australian Racing Board;*
 - (ii) *the Gaming and Wagering Commission;*
 - (iii) *the Department of Racing, Gaming and Liquor;*
 - (iv) *any other sporting or racing body; and*
 - (v) *any other persons,*

in relation to the operation, use of, and/or participation in betting exchanges for amendments to Western Australia law in relation to any one or more of the matters referred to in (a) above.
 - (c) *All documents ... relating to any proposed procedure for the regulation of betting exchanges.*
 - (d) *Any supporting documents, information, materials or evidence in relation to the categories of documents listed in (a) to (c) above.”*

4. I understand that:

- A betting exchange is a form of betting available on the internet where gamblers bet against each other that certain events will or will not happen at whatever odds they agree upon. The exchange acts as a broker between the parties and charges a flat fee per trade or takes a percentage of the winnings. In effect, it operates as a risk market similar to a futures or commodities market. The Western Australian Government has legislated to prohibit the operation of betting exchanges, such as Betfair Pty Ltd, in this State: see *Betting and Racing Legislation Amendment Act 2006*.
- The agency was established under the *Racing and Wagering Western Australia Act 2003* as a statutory authority by the merger of the Western Australian Turf Club, the Western Australian Trotting Association and the Western Australian Greyhound Racing Authority, together with the off-course betting activities of the State regulated Totalisator Agency Board ('the TAB'). The agency is the controlling authority for thoroughbred, harness and greyhound racing in Western Australia.
- The Australian Racing Board ('the ARB') is a non-government not-for-profit organisation with objectives that are concentrated on developing, encouraging and promoting the sport of thoroughbred racing throughout Australia. Its members are the Principal Racing Authorities that supervise and control thoroughbred racing in each State and Territory. The agency is the Principal Racing Authority for Western Australia.
- The Gaming and Wagering Commission of Western Australia is a statutory authority established by the *Gaming and Wagering Commission Act 1987* and is responsible for the administration of that Act, the *Casino Control Act 1984* and the *Casino (Burswood Island) Agreement Act 1985*. The Director General of the Department of Racing, Gaming and Liquor is the ex-officio Chairman of the Gaming and Wagering Commission.
- The Department of Racing, Gaming and Liquor is a Department of the public service established under s.35(1) of the *Public Sector Management Act 1994* and administers the relevant racing, gaming and liquor legislation consistent with government policy.

5. By letter dated 29 December 2006, the agency confirmed that it had identified three documents as coming within the scope of part (a) of the complainant's access application and refused access to those three documents under clause 4(2) of Schedule 1 to the FOI Act. The agency identified one document as coming within the scope of part (b) of the complainant's access application and granted access in full to that document.

6. The complainant sought internal review of that decision and, on 2 February 2007, the agency provided it with a notice of decision that identified additional documents within the scope of the complainant's access application. The agency released two of the documents the subject of its initial decision; abandoned its claim for exemption under clause 4(2) for one of the documents the subject of its initial decision but still refused access to it, claiming exemption under clause 6(1); and granted access to all except two of the additional documents. The agency claimed exemption for the latter under clause 5(1) of Schedule 1 to the FOI Act.

REVIEW BY THE A/INFORMATION COMMISSIONER

7. On 7 March 2007, the complainant applied to the former A/Information Commissioner ('the former A/Commissioner') for external review of two issues:
 - the agency's decision to deny access to a document described by the agency in its notice of decision as "*Board Report dated 28/11/05 – Strategic Plan to counter betting exchanges*"; and
 - the agency's deemed refusal of access to documents which the complainant considers should exist but which have not been located by the agency.
8. In the course of dealing with this matter, the complainant advised my Investigations Officer that it is no longer seeking external review in relation to the second of those issues.
9. On 19 July 2007, Betfair Pty Ltd provided written authorisation consenting to the disclosure to the complainant of any commercial and/or business information about it which may be contained in the disputed document.
10. On 20 July 2007, the former A/Commissioner provided the parties with her written preliminary view of this complaint. On the information before her at that time, it was her preliminary view that the disputed document was not exempt under clause 6(1) of Schedule 1 to the FOI Act. The agency did not accept the former A/Commissioner's preliminary view and made further written submissions and provided further information in support of its claim for exemption.
11. The complainant was provided with a copy of the agency's submissions and also provided further written submissions in support of its claim that the disputed document is not exempt under clause 6(1).

THE DISPUTED DOCUMENT

12. The disputed document is a Board Report of the Board of the agency and is titled "*Board Report dated 28/11/05 – Strategic Plan to counter betting exchanges*". It is item 4.3.1 on the agency's agenda for its Board meeting of 28

November 2005 and is marked 'Confidential'. It consists of four pages attached to which are eight appendices. For the purposes of this decision, the Board Report and the eight appendices are together considered to be one document.

THE EXEMPTION

Clause 6 - Deliberative processes

13. The agency claims that the Report is exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6 provides, insofar as it is relevant:

“6. Deliberative processes

Exemptions

(1) *Matter is exempt matter if its disclosure —*

(a) *would reveal —*

(i) *any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(ii) *any consultation or deliberation that has taken place,*

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and

(b) *would, on balance, be contrary to the public interest.*

Limits on exemption

(2) *...*

(3) *Matter that is merely factual or statistical is not exempt matter under subclause (1).*

(4) *...”*

14. There are two parts to clause 6(1) and the agency must satisfy the requirements of both paragraphs (a) and (b) in order to establish a *prima facie* claim for exemption. In the case of this exemption, the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; it is entitled to access unless the agency can establish that disclosure of the disputed document would, on balance, be contrary to the public interest. Thus the onus is on the agency rather than the complainant to establish that the disputed document is exempt under clause 6.
15. The deliberative processes of an agency are its 'thinking processes', the process of reflection for example on the wisdom and expediency of a proposal, a particular decision or a course of action: see *Re Waterford and Department of*

the Treasury (No 2) (1984) 5 ALD 588; also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

16. Because the exemption in clause 6(1) potentially applies to a large range of administrative documents, the decision in *Re Waterford* makes it clear that documents disclosing deliberative processes must be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. The exemption in clause 6(1) will only apply to documents containing opinion, advice or recommendations, or which would reveal consultations or deliberations, and where disclosure would, on balance, be contrary to the public interest.
17. Taking into account the content of, and context in which, the disputed document was created, I accept that it contains opinion and advice that has been obtained, prepared and recorded in the course of a deliberative process of the agency. In this case, I understand the relevant deliberative process to be the agency's consideration of how to manage the challenges presented to its business by the operation of a betting exchange or exchanges. Accordingly, I consider that the agency has satisfied the requirements of paragraph (a) of clause 6(1).

The agency's submissions

18. As I understand it, the agency submits that its deliberative process is not completed. The disputed document presents possible options, the likely outcomes of adopting those options and the positive and negative aspects of doing so. At the time it was put to the Board in November 2005 the resolution of the Board was to note the disputed document.
19. In December 2006, the State Government passed the *Betting and Racing Legislation Amendment Act 2006* which effectively prohibits a person in Western Australia betting through the use of a betting exchange. That legislation is currently being challenged in the High Court.
20. Against that background, the agency submits that the disclosure of the disputed document would be contrary to the public interest, for the following reasons, which I have summarised:
 - the agency is not publicly funded and its Board of Directors has duties under the *Statutory Corporations (Liability of Directors) Act 1996* which are comparable to the duties contained in the *Corporations Act 2001*;
 - the agency is already subject to extensive public scrutiny provided by its own governing statute, the *Racing and Wagering Act 2003*; and
 - the complainant is not "...acting from a public interest, but from their own narrow personal and commercial interest in challenging the validity of the Western Australian legislation."

21. The agency further submits that the complainant has made a number of access applications where it states it is acting for Betfair Pty Ltd. The agency says the complainant must have misrepresented to the Information Commissioner that in this matter it is not acting on behalf of any party and therefore this matter *“might amount to an action in bad faith.”*
22. The agency submits that, although its formal position on betting exchanges has been stated publicly the issue of how to respond to a challenge to its market share is still very much a current one. The agency submits that it is contrary to the public interest to disclose its deliberations in these circumstances and that the exemption afforded by clause 6(1) of schedule 1 to the FOI Act applies.
23. The agency submits that it is required to prepare and submit to the relevant Minister an annual strategic development plan which details the agency’s competitive strategies. That plan is not tabled in Parliament. Therefore, the agency submits that it is contrary to the public interest for an applicant to circumvent the intentions of Parliament and obtain access to the agency’s strategic thinking through the provisions of the FOI Act.
24. Finally, the agency submits that it has *“statutory functions under the RWWA Act to control, regulate, supervise and develop racing, and to fund racing and sports, in the State in the public interest. Any outcome that would hamper the performance of these functions, and particularly any outcome that reduced RWWA’s ability to compete in the wagering market place, would weaken the racing industry and would be contrary to the public interest.”*

The complainant’s submissions

25. The complainant was provided with a copy of the agency’s response to the former A/Commissioner’s preliminary view and invited to make submissions. The complainant’s submissions can be summarised as follows:
 - the disputed document is dated November 2005 and the views of the agency regarding betting exchanges are on the public record;
 - the disputed document is not a draft document but a final report, which has been considered and acted on by the agency;
 - the government response to betting exchanges is reflected in the legislation, currently the subject of the High Court challenge;
 - the agency’s claims regarding the complainant’s interest in obtaining access to the disputed document are unworthy and should be rejected;
 - the agency has not properly considered paragraph (b) of clause 6(1) because it has not properly explained how or in what way the disclosure of the disputed document would, on balance, be contrary to the public interest;

- the agency's reliance of clause 6(1) is a misuse of that exemption to the extent that it is not supportive of open and accountable government and the objects of the FOI Act, as set out in section 3(1). Claiming clause 6(1) is inconsistent with the public interest in the accountability of government agencies as set out in *Re Ravlich and Building and Construction Industry Training Fund Board* [1999] WAICmr 45 at paragraph 27, where the former Information Commissioner said:

“Access laws are generally designed to open the decision-making processes of government agencies to scrutiny by the public, and to allow the public to effectively participate in those processes and in government itself. In my view, effective public participation requires that the public has access to relevant and timely information. I consider that there is a public interest in the disclosure of information that would explain priorities, clarify resource allocation, and prompt debate and discussion about the operations of a government agency.”;

- it is in the public interest for the disputed document to be disclosed because there is considerable public interest in ensuring openness and accountability in decision-making. The agency's policies in relation to betting exchanges are of considerable ongoing public interest. The agency's compliance with its policies is a matter of overwhelming public interest.

Consideration

26. The agency's claim that the complainant is acting in bad faith, or has no legitimate interest in the disputed document is not based on any supporting factual material available to me. I understand the agency's claim that the complainant is perverting the FOI Act by seeking access to the disputed document, to be an argument that the complainant is abusing the process the agency claims has been established by the Parliament of Western Australia to protect sensitive commercial strategic documents of the agency.
27. I find that claim to be lacking in substance and to demonstrate a misunderstanding of the principles of the FOI Act. The agency is not listed in Schedule 2 to the FOI Act as an exempt agency. The Parliament has the opportunity to consider the sensitivity of the operations of the agency. The accountability and transparency objectives of the FOI Act apply to the agency.
28. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. Further, s.10(2) of the FOI Act provides that a person's right to be given access is not affected by any reasons the person gives for wishing to obtain access or the agency's belief as to what are the person's reasons for wishing to obtain access.

29. I dismiss the agency's claim that the complainant does not have a legitimate interest in the disputed document and that the access application is made in bad faith as being unsupported by any probative material.
30. It appears to me that the agency is claiming exemption under clause 6 on the basis that there is a public interest in not prejudicing the ongoing deliberations of Government or an agency by disclosure. That is a public interest that this office has consistently recognised.
31. However, in this instance, I consider there is some substance to the complainant's submissions that the disclosure of the disputed document could not destroy or otherwise adversely affect the integrity of the agency's deliberative processes. In my opinion, there is nothing before me which establishes that the particular information recorded in the disputed document is presently being used in, or for, the purposes of the deliberations of the agency, the Minister, or the Government generally.
32. In this case, the disputed document was presented to the Board of the agency and noted by it in November 2005. I consider that the options open to the agency were made clear at that point and that particular deliberative process is at an end. I do not accept that the relevant deliberative process includes the ongoing exploration of the issues or that the deliberative process reflected in the disputed document hinges on the outcome of the High Court case referred to. The agency has given me no details as to how that case is relevant and it seems unlikely to me that the agency would put its business affairs on hold - insofar as they relate to the question of betting exchanges - until such time as a decision is handed down in that case. In particular, I note that all of the appendices of the disputed document appear to be information that is in the public domain, so that it has not been made apparent to me by the agency how their disclosure could adversely affect the agency's deliberative processes or be otherwise contrary to the public interest.
33. In any event, as I understand it, the *Betting and Racing Legislation Amendment Act 2006* was assented to on 13 December 2006 and the provisions relating to betting exchanges commenced operation on 29 January 2007. As a result, s.27B has been inserted into the *Betting Control Act 1954* and that provision makes it an offence to establish or operate a betting exchange. Therefore, any deliberations within the agency regarding the operations or potential operations of betting exchanges in Western Australia must have been finalised because the legislation banning the establishment and/or operation of betting exchanges is now in force.
34. Weighing against disclosure, I accept that it may be contrary to the public interest to prematurely disclose deliberative documents whilst deliberations in the agency are continuing, if there is material which establishes that such disclosure would adversely affect the deliberative or decision-making processes or that disclosure would, for some other reason, be demonstrably contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure.

35. The agency has provided me with insufficient information to show to the relevant probative standard how the disclosure of the disputed document would adversely affect its decision-making processes. I agree with the complainant that the agency has not explained how or in what way the disclosure of the disputed document would, on balance, be contrary to the public interest.
36. Weighing in favour of disclosure, I recognise that there are general public interests in persons being able to obtain access to information held by government agencies and in the exercise of their rights of access under the FOI Act.
37. I accept that there is a public interest in an agency's views as to any innovations that may affect the agency's core business or commercial interests being made known in a timely fashion. I also recognise that there is a strong public interest in agencies being accountable for their decision-making and in the public having access to information about those processes.
38. I consider that there is a public interest in the public being able to scrutinize the operations of the agency and make its own judgement as to whether it is discharging its functions effectively and according to its constituent legislation and published policies.
39. Therefore, in balancing the competing public interests, I consider that the public interests favouring disclosure of the disputed document outweighs those public interests that do not favour disclosure. In my opinion, the agency has not satisfied the requirements of clause 6(1)(b). Disclosure of the disputed document would not, on balance, be contrary to the public interest. Therefore, I find that the disputed document is not exempt under clause 6(1) of Schedule 1 to the FOI Act.

Clause 12

40. Whilst the agency has not made submissions as to the relevance of clause 12 of Schedule 1 to the FOI Act, in light of the High Court proceedings, I have had regard to the current status of those proceedings. Clause 12(a) provides that matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown be in contempt of a court.
41. I have examined the transcript of the High Court proceedings to date. There is no reference in the proceedings to the Board's consideration of betting exchanges, nor the agency's consideration of options in relation to betting exchanges. In the circumstances of this matter, I do not consider that the disclosure of the disputed document would have the effect referred to in clause 12(a) of Schedule 1 to the FOI Act.
