OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2007011 Decision Ref: D0072007

Participants:

Betfair Pty Ltd
Complainant

- and -

Department of the Attorney General
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to legal advice about Work Choices legislation - section 26 - whether reasonable grounds to believe that a document exists or should exist - sufficiency of searches.

Freedom of Information Act 1992: ss.3; 15(1); 23(2); 26; 30; 76(5); 94-97; clause 7; Schedule 1
Betting and Racing Legislation Amendment Bill 2006
Workplace Relations Amendment (Work Choices) Act 2005
Workplace Relations Act 1996

New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52
Re Doohan and Police Force of Western Australia [1994] WAICmr 13
Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 74 ALJR 339
Commissioner of Taxation of the Commonwealth of Australia v Spotless Services Ltd (1996) 141 ALR 92

DECISION

The decision of the agency to refuse access under section 26 of the *Freedom of Information Act 1992* is confirmed. The agency has taken all reasonable steps to find the requested documents but they do not exist or cannot be found.

D A WOOKEY
A/INFORMATION COMMISSIONER

13 April 2007

REASONS FOR DECISION

BACKGROUND

1. This complaint arises from a decision of the Department of the Attorney General ('the agency') to refuse Betfair Pty Ltd ('the complainant') access to documents under s.26 of the *Freedom of Information Act 1992* ('the FOI Act') on the basis that those documents cannot be found or do not exist.

2. In an access application dated 30 November 2006 to the agency, the complainant sought access to legal advice provided on the implications of the decision of the High Court of Australia in *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 ('the High Court decision') in relation to the application of the Australian Constitution to bills currently before the Parliament of Western Australia, including the *Betting and Racing Legislation Amendment Bill 2006.*

3. Specifically, the complainant sought access to:

   "(a) Legal advice (including any opinion from junior or senior counsel) in relation to the application of the Australian Constitution to Bills laid before the Western Australia [sic] *Parliament in light of the Case.*

   (b) All documents (including internal documents and transcripts or notes of meetings) relating to the advice listed in (a) above.

   (c) Any supporting documents, information, materials or evidence in relation to the categories of documents listed in (a) and (b) above."

4. On 30 November 2006, the agency referred the complainant's access application to the State Solicitor's Office ('the SSO'), a separate office within the agency. Although part of the agency, I understand that the SSO operates in the main as an independent office. The SSO dealt with the access application on behalf of the agency.

5. In a notice of decision dated 5 December 2006, the SSO's FOI Coordinator refused the complainant access to the requested documents under s.26 of the FOI Act on the basis that he had conducted a thorough search of the SSO's Records Database but that such documents cannot be found or do not exist. On 19 December 2006, the complainant sought internal review of the agency's decision. The complainant contended that, given the high profile nature of the High Court case, documents of the kind requested should exist.

6. The agency confirmed its initial decision to refuse the complainant access to the requested documents under s.26 of the FOI Act. The internal reviewer advised that he also had conducted a search of the SSO's Records systems and files but that he had been unable to identify any documents that were within the scope of the complainant's access application.

7. On 12 January 2007, the complainant made an application for external review by the Information Commissioner.

REVIEW BY THE A/INFORMATION COMMISSIONER

8. The agency produced to me the FOI file relating to the complainant's access application. I have examined that file and the information provided to me in the complaint. My Investigations Officer attended at the SSO on 31 January 2007 and made inquiries with the FOI Coordinator in relation to the searches conducted.

9. On 20 February 2007, I informed the parties, in writing, of my preliminary view of this complaint. My preliminary view was that, following inquiries by my office, the agency had taken all reasonable steps to find the requested documents but they did not exist or could not be found. Accordingly, I invited the complainant to withdraw its complaint or provide me with submissions relevant to the matter for my determination. I also expressed the view that, given the nature of the documents as described in the access application, the agency could have refused access under s.23(2) of the FOI Act on the basis that any such documents, if they existed, would be exempt under clause 7 of Schedule 1 to the FOI Act because they would be privileged from production in legal proceedings on the ground of legal professional privilege.

10. In response to my preliminary view, the complainant confirmed that it wished to pursue its complaint given the high profile nature of the matter before the High Court and, in particular, the publicity relating to the impact of the High Court decision. On 9 March 2007, I received submissions from the agency in response to my preliminary view. The agency's submissions were made by the SSO.

11. Some of the agency's submissions in response to my preliminary view were not relevant to the matters in issue before me. For example, the agency objected to my comment that its notices of decision did not, in my opinion, comply with the statutory requirements of s.30 of the FOI Act in that they did not give the findings on all material questions of fact underlying the agency's reasons for refusal of access, together with reference to the material on which the findings were based. The agency claimed that its statement to the complainant that it had searched its databases but no documents could be found was the only material finding of fact it had to give, and that the material on which that was based was that a thorough search of the agency's records had been done. The agency contended that it is unnecessary to give any detail of the searches and that, rather, *"…the applicant simply needs to be given the agency's formal assurance, in its notice of decision, that the agency has undertaken searches as required by the FOI Act and that it has found no documents which fall within the scope of the access application."*

12. I disagree with that submission. Before an agency can refuse access under s.26 of the FOI Act, it must have taken all reasonable steps to find the requested document. For an applicant to be able to be satisfied that all reasonable steps

have been taken the applicant needs some information as to the searches conducted. If an applicant is merely told by an agency that its records have been searched and no documents found, the applicant will not be in a position to assess whether or not, in his or her view, all reasonable steps have been taken and to accept the decision or to seek a review of it and perhaps suggest additional searches that could be made or give further information that may assist in locating documents. Had some detail of the kinds of searches undertaken been given in the notices of decision it may not have been necessary, firstly, for the complainant to seek internal review and external review to be satisfied that all reasonable steps had been taken and, secondly, for me to have one of my officers attend at the agency to obtain that information.

13. In her decision in *Re Doohan and Police Force of Western Australia* [1994] WAICmr 13, the former Information Commissioner dealt with a decision to refuse access to documents under s.26 of the FOI Act. At paragraph 29 of her reasons for that decision, the former Information Commissioner said that, when an agency is unable to locate requested documents, an adequate statement of reasons may go some way towards reassuring a sceptical applicant and that, in her view, the minimum requirement was a brief explanation of the steps taken by the agency to satisfy the request. The former Information Commissioner observed that such an explanation should include the locations searched, why those locations were chosen and a description of how the searches were conducted. I agree with that view. Since the commencement of the FOI Act in 1993, people seeking access to government documents no longer have to rely on an agency's "formal assurance" in response to a request. They are entitled to proper reasons for an agency's decision, the findings on material questions of fact underlying those reasons and information as to the material on which the findings are based.

14. In a similar vein, the agency submitted that I should not include in my decision any detail of the searches undertaken as that detail is *"irrelevant and inappropriate and…would not assist the public's factual understanding of this matter in any way."* Again, I disagree. The stated objects of the FOI Act (s.3) are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public. To be enabled to participate more effectively in governing the State, the public needs to have access to government information, which is why the FOI Act creates a right of access to government documents, and information as to how government and its agencies operate. It is also why agencies are required by ss.94-97 of the FOI Act to publish information statements including, among other things, a description of the kinds of documents they hold and how the public can access them.

15. In my opinion, advice as to the kinds of records held by government agencies and the systems by which they are held and managed can be of great assistance to members of the public exercising their rights under the FOI Act. In cases where access is refused on the basis that documents do not exist or cannot be found, it greatly assists an applicant to be confident that it is, in fact, the case that the documents do not exist or cannot be found if the kinds of searches undertaken to find them are explained. Explanations of that kind promote

public confidence in agencies' decisions and help to dispel suspicions that no real effort to locate documents has been made or that documents are being deliberately withheld.

16. Further, as are agencies by s.30 of the FOI Act, I am required by s.76(5) of the FOI Act to include, in my decisions, the reasons for each decision and the findings on material questions of fact underlying those reasons, referring to the material on which those findings are based. In this case, the material on which my finding that the agency has taken all reasonable steps to locate the requested documents is based is the information obtained as to the steps taken by the agency to locate them – that is, the detail of the searches undertaken by the agency. Unless I were persuaded that there were any good reason not to include that information in my reasons for decision, I would consider it inconsistent with my responsibilities not to do so. I do not consider that it would inspire public confidence in the FOI process, including the external review process, if I did not explain why I am satisfied that the agency has taken all reasonable steps to locate the requested documents. That is the basis on which the agency refused access, both initially and again on internal review.

Documents that do not exist, or cannot be found

17. Section 26(1) of the FOI Act deals with the obligations of an agency when it is unable to locate documents sought by an access applicant or those documents do not exist. Section 26 provides:

> *"(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
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> *(a) all reasonable steps have been taken to find the document; and*
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> *(b) the agency is satisfied that the document –*
>
> *(i) is in the agency's possession but cannot be found; or*
>
> *(ii) does not exist.*
>
> *(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."*

18. I consider that, when dealing with a complaint against a decision to refuse access to documents under s.26 of the FOI Act, there are two questions that must be answered. The first question is 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 the first question is answered in the affirmative, the next question, in my view, is whether the agency has taken all reasonable steps to find those documents.

19. I do not consider that it is my function to physically search for the requested documents on behalf of a complainant. 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.

Is it reasonable to believe the requested documents exist, or should exist within the agency?

20. In December 2005, the Parliament of Australia enacted the *Workplace Relations Amendment (Work Choices) Act 2005* ('the Work Choices Act'). The Work Choices Act made extensive changes to the Commonwealth *Workplace Relations Act 1996* ('the Workplace Act'). The Work Choices Act altered the constitutional basis of the Workplace Act by using the corporations power of the Constitution to install a national industrial relations system. The Commonwealth Parliament's capacity to rely upon that power to sustain the legislation was the principal question in issue in the proceedings brought by five States and two union bodies against the Commonwealth which resulted in the High Court decision.

21. The States of New South Wales, Queensland, South Australia, Western Australia and Victoria and the Australian Workers' Union and Unions New South Wales challenged the validity of the Work Choices Act and, in particular, the Federal Government's reliance on the corporations power to enact the Work Choices Act. The High Court of Australia ruled that the Federal Government's use of the corporations power in the Constitution to install a national industrial relations system was valid.

22. Mr R J Meadows QC, Solicitor-General for the State of Western Australia, with Mr R M Mitchell and Mr D J Matthews (instructed by the State Solicitor for Western Australia), represented the State of Western Australia in the High Court proceedings.

23. As a result of the High Court decision, there was considerable publicity in the print media in Western Australia, in which comment was made by various individuals, including the then Leader of the Federal Opposition, Mr Kim Beazley; the Premier, Mr Alan Carpenter; the Leader of the State Opposition, Mr Paul Omodei; and various legal and political commentators.

24. The High Court decision also resulted in a number of questions being asked in the Parliament of Western Australia, and a statement being made by the then Minister for Employment Protection, Hon J Bowler MLA, on 21 November 2006, on what he described as the "profound implications" of the High Court decision not only on the State's industrial relations but on *"…almost every other existing right of the state in law."*

25. My preliminary view was that it was not unreasonable to expect, based on the interest generated in the media and the Parliament of Western Australia and the apparent significance of the High Court decision, that on the handing down of the High Court decision the Government of Western Australia, as a party to the

proceedings, would have requested legal advice as to the implications of that decision, generally and specifically, on bills currently before the Western Australian Parliament, or proposed to be put before the Parliament.

26. Such advice, if it were sought, may not necessarily have been sought from the agency. Government can and does obtain legal advice from other sources, such as private law firms and independent counsel. However, as the SSO's core business is the provision of legal advice to the State Government and its agencies, and the SSO itself acted for the State in the legal action that resulted in the High Court decision, I did not consider it unreasonable to expect that, if such advice had been sought, it would have been sought from the SSO.

27. In response to my preliminary view, the agency submitted that there are no reasonable grounds to expect that the requested documents exist or should exist, and are, or should be, held by the agency, and that I "fell into error" in answering the question of whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. In this regard, the agency submitted that "[t]*he Work Choices decision…solely concerned the validity of Commonwealth legislation.*…[and]*…did not address any question relating to the validity of State legislation, and nothing in the Work Choices decision addressed any question relating to the States' legislative powers, or any question regarding the application of the* Constitution *to State legislation, which could have any bearing on Bills before the State Parliament."*

28. The agency argued that, while the High Court decision has significant implications for the extent of the Commonwealth's legislative power, and the range of the matters about which it may be able to legislate in reliance on the corporations power, the complainant did not request access to legal advice about the implications of the High Court decision generally, or about the practical implications of the High Court decision on the matters about which the Commonwealth might be able to legislate in the future or how this might affect areas traditionally regarded as subject only to State regulation. The agency argues that the High Court decision has no bearing on the validity of bills currently before the Western Australian Parliament or proposed to be put before the Parliament and therefore "*…there exist no reasonable grounds to believe that there exist, or should exist, documents comprising legal advice provided on the implications of the Work Choices decision regarding the application of the* Constitution *for bills currently before the Parliament of Western Australia."*

29. The agency argues that, therefore, the question of whether or not it is reasonable to expect that documents of the kind requested exist should be answered in the negative; that the only issue that needs to be addressed is that; and that it is unnecessary for me to publish details of the searches undertaken by the agency or the inquiries made by my office in respect of them for any documents that may be within the scope of the access application.

30. Although it may well be the case that the decision can have no effect on bills currently before the Western Australian Parliament, that does not mean that it is unreasonable to expect that the Government or one or more of its Ministers

might not have sought legal advice on that very question, particularly given that the High Court decision concerned, very broadly, the extent of the Commonwealth's legislative powers in relation to areas traditionally considered within the State's legislative powers and, for example, given the view of the then Minister for Employment Protection that the decision had *"…profound implications for almost every other existing right of the state in law."*

31. Further, I query why, if it is the agency's view that it is not reasonable to expect that any such documents should exist, it did not advise the complainant of that but instead conducted searches for such documents initially and again on internal review and did not raise this issue in response to any of the inquiries made by my office in investigating this complaint. In any event, as I have said, I do not consider that the agency's opinion that the decision could not impact on any State bills necessarily means that advice on that question would not have been sought. As I have said, I do not consider it unreasonable to expect that the Government, a Minister or Ministers, many of whom are not legally trained, would have sought legal advice on that very question. I am not, therefore, dissuaded from my view that it is not unreasonable to expect that such documents might exist and, if they exist, may be held by the agency.

The searches conducted by the agency

32. My Investigations Officer attended at the SSO on 31 January 2007 and had demonstrated to her the searches conducted by the agency to locate the documents the subject of the complainant's access application. It was confirmed to my officer that it is the usual practice for a Minister to request legal advice from the State Solicitor in writing and that such written requests are recorded in a computerised database recording all incoming correspondence.

33. In response to my preliminary view, the agency submitted that it is irrelevant to my determination of this matter as to how requests by a Minister for legal advice are received by the SSO, because the complainant's access application is not limited to legal advice by a Minister. I do not accept that submission. If the Government sought legal advice as to the implications of the High Court decision on any particular bills before the Parliament, it is most likely that the request for advice would have been made by a Minister.

34. My officer was advised that, on receipt of such a request, the General Manager of the SSO allocates the request for legal advice to the appropriate legal officer of the SSO who then prepares a written opinion. The agency confirmed to me that the opinions provided by its legal officers are always in writing. However, the agency also confirmed that, in relation to some minor matters, a legal officer may provide a verbal opinion by telephone.

35. The agency also advised my officer that the hard copy of the opinion is filed on the appropriate file within the SSO and a form is completed by the legal officer who has prepared the opinion, which form contains general information about the opinion including a general description of that opinion. The information from that form is entered into a computerised database known as the 'Opinions System'. Access to the 'Opinions System' database is restricted to a limited

number of administration and clerical staff (such as the General Manager, Assistant General Manager and the Senior Managing Law Clerk) within the agency. All legal officers have access to the 'Opinions System'.

36. The SSO's FOI Coordinator confirmed to my officer that on receipt of the access application he conducted searches of the agency's Total Records Information Management (TRIM) system and the 'Opinions System' database by using a number of different prompts to search for any documents that may exist within the agency and come within the scope of the access application.

37. The SSO's FOI Coordinator used the terms 'Australian Constitution'; 'Bills'; 'Betfair'; 'Betting and Racing Legislation'; and 'Amendment Bill 2006' as prompts. My officer had demonstrated to her the searches of the agency's TRIM system using 'Amendment Bill 2006' as the prompt. No documents that come within the scope of the access application were identified. I have also examined a print-out of results of TRIM searches conducted by the agency. One of those results indicates to me that the prompts used would have located documents of the kind requested if they existed and were held by the agency.

38. My office also made inquiries as to whether the Solicitor General maintained any separate records to those filed within the agency. The SSO's FOI Coordinator confirmed that the Solicitor General does maintain separate records. Consequently, the FOI Coordinator contacted the Solicitor General's personal assistant, who advised him that she was not aware of any documents within the scope of the access application existing in the records of the Solicitor General.

39. The agency also confirmed to me that the Solicitor General's personal assistant contacted Mr Robert Mitchell who was one of the instructing solicitors representing the State of Western Australia in the High Court matter and he confirmed to the Solicitor General's personal assistant and the SSO's FOI Coordinator that he was not aware of any requests for legal advice regarding the implications for the State of Western Australia of the High Court decision in respect of any bills before the State Parliament.

40. There is also a note in the agency's FOI file indicating that inquiries were made with three other solicitors employed in the agency – including Mr Matthews, the other instructing solicitor for Western Australia in the High Court case – but none had any documents within the scope of the access application.

41. In its response to my preliminary view, the agency submitted that, as the office of the Solicitor General is a separate agency for the purposes of the FOI Act, information about enquiries made with that office is irrelevant to the resolution of this complaint and that it *"…is quite inappropriate for* [me] *to disclose to any other person information as to whether the Solicitor General has received requests for any legal advice (much less the specific details of such legal advice) or whether the Solicitor General has documents which fall within the scope of the access application."*

42. The Solicitor General is a separate agency for the purposes of the FOI Act. The Solicitor General is not an exempt agency for the purposes of the FOI Act. The relevance of the enquiries made with the Solicitor General as to whether or not that office held any documents within the scope of the access application is that, if an agency receiving an access application does not hold the requested documents but knows, or has reasonable grounds to believe, that the requested documents are held by another agency, the agency has to transfer the access application to the other agency (s.15(1)).

43. Given that the Solicitor General, with others, represented the State in the legal proceedings that led to the High Court decision, it is not unreasonable to expect that, if advice had been sought in respect of the application of the decision to bills currently before the State Parliament, that advice may have been sought from the Solicitor General. I consider it relevant to a determination of whether or not the agency took all reasonable steps to locate the requested documents that it made enquiries with another agency which may have held documents within the scope of the complainant's access application. In any event, those enquiries have revealed that the Solicitor General does not have any documents within the scope of the access application.

44. In its response to my preliminary view, the agency made a number of submissions that I should not include in my reasons for this decision details of the SSO's record-keeping processes or searches undertaken to locate documents in response to the complainant's access application. However, the agency's submissions were on the basis that such information is irrelevant, in its view, rather than on any articulated need for, or public interest in, confidentiality of that information. In the absence of any such arguments or evidence, I am not persuaded that there is any need for such secrecy and I consider it relevant to my determination of this matter to explain, not only to the parties to this complaint, but to the public, the reasons why I am satisfied that the agency, on this occasion, has indeed taken all reasonable steps to locate the requested documents but that they either cannot be found or do not exist. That was the basis of the agency's refusal of access - both initially and again on internal review.

45. Following those inquiries by my office detailed above, there is no evidence before me that any documents exist within the agency which are within the scope of the complainant's access application. Having reviewed the searches undertaken by the agency, I am satisfied, for the reasons given above, that all reasonable steps to locate the requested documents have been taken but that the requested documents cannot be found or do not exist, more probably the latter.

Section 23(2)

46. Further, even if I were not of that view, as I indicated to the parties in my preliminary view, I would not have required the agency to conduct any further searches because it appears to me that any documents fitting the description of the requested documents would be exempt.

47. In my view, it would, therefore, have been open to the agency to have refused access to the requested documents under s.23(2) of the FOI Act, without searching for, or identifying, any documents. Section 23(2) of the FOI Act provides that:

> *(2) "The agency may refuse access to the requested documents, without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt matter if —*
>
> *(a) it is apparent, from the nature of the documents as described in the access application, that all of the documents are exempt documents; and*
>
> *(b) there is no obligation under section 24 to give access to an edited copy of any of the documents."*

48. For an agency to rely on s.23(2) to refuse access, it must be apparent from the nature of the documents as described in the access application that they are all exempt documents. The terms "exempt document" and "exempt matter" are defined in the Glossary to the FOI Act. An exempt document is one that contains exempt matter. Exempt matter means matter that is exempt under Schedule 1. In this instance, in my view, the requested documents, as described in the complainant's access application, would all be exempt documents because they would all contain matter that is exempt under clause 7 of Schedule 1 to the FOI Act.

49. Clause 7 provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege applies to, among other things, confidential communications between a client and his or her legal adviser made for the dominant purpose of giving or seeking legal advice, or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 74 ALJR 339. In *Commissioner of Taxation of the Commonwealth of Australia v Spotless Services Ltd* (1996) 141 ALR 92, the High Court, considered the meaning of the term "dominant purpose" and stated that "*in its ordinary meaning dominant indicates that purpose which was the ruling, prevailing, or most influential purpose*".

50. I have considered the nature of the documents as described in the access application. It appears to me that any documents of that nature would be or would reveal confidential communications between a client and his or her legal adviser made for the dominant purpose of giving or seeking legal advice and therefore those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. In my view, therefore, documents of the kind described in the complainant's access application would be exempt under clause 7 of Schedule 1 to the FOI Act.

51. Given that the access application was specifically for legal advice and documents directly relating to any such legal advice, it seems to me that there would not have been any obligation on the agency to give access to edited

copies of documents as the material that would have been deleted – the privileged material – is clearly the material requested by the complainant.

52. Consequently, it was open to the agency to have refused the complainant access to the requested documents by relying on s.23(2) of the FOI Act, on the ground that, even if the requested documents did exist and could be located, they would all be exempt documents.

CONCLUSION

53. For the reasons given above, it seems to me to be not unreasonable to expect that documents of the kind sought by the complainant might exist. If such documents were to exist, it is likely that they would exist in the agency, although that is not necessarily the case.

54. Having reviewed the searches undertaken by the agency, and the inquiries conducted by my office, for the reasons given above I find that all reasonable steps to find the requested documents have been taken but that the requested documents cannot be found or do not exist.

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