COULSON AND WATA

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 97195** **Decision Ref: D0071998**

Participants:

Phillip Charles Coulson
Complainant

- and -

Western Australian Trotting Association
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access to a document – audiotape recording of Stipendiary Stewards' inquiry – clause 5(1)(b) – investigation of a possible contravention of the Rules of Trotting – whether the Rules of Trotting are law – whether disclosure could reasonably be expected to reveal the investigation – whether disclosure of edited copy would reveal the investigation – whether editing would be practicable.

Freedom of Information Act 1992 (WA) ss.3(3), 24, 76(4); Schedule 1 clauses 5(1)(a), 5(1)(b), 5(5), 6(1) and 8;
Interpretation Act 1984 (WA) ss.5, 41, 42;
Western Australian Trotting Association Act 1946 – 1948 ss.6, 7; Schedule 1 by-laws 2, 59, 60;
Industrial Relations Act 1988 (Cth);

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550;
Police Force of Western Australia v Kelly and Another (1996) 17 WAR 9;
Police Force of Western Australia v Winterton (unreported; Supreme Court of Western Australia; Library No. 970646; 27 November 1997);
Re U and Curtin University of Technology and Another (Information Commissioner WA, 19 November 1997, unreported, D03097);
Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466;
Ex Parte McLean (1930) 41 CLR 472;
Ansett Transport Industry (Operations) Pty Ltd v Wardley (1980) 142 CLR 237;
Harper v Racing Penalties Appeal Tribunal of Western Australia and Another (unreported; Supreme Court of Western Australia; Library No. 930738.1; 26 November 1993).

DECISION

The decision of the agency is varied. The disputed document is exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992.*

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

24 February 1998

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision by the Western Australian Trotting Association ('the agency') to refuse Mr Coulson ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

2. On 30 June 1997, the complainant was the driver of a horse called *"To the Point"* and he was competing in Race 5, the Pinjarra Paceway Social Discretionary Handicap, held at the Pinjarra Trotting Club. As a result of an incident that occurred during the race, the steward in charge of the race meeting convened an inquiry under the *Rules of Trotting* ('the Rules') to investigate the incident. However, as one of the drivers involved in the incident had left the track, the inquiry was adjourned until 14 July 1997.

3. The inquiry was reconvened on 14 July 1997 and an audiotape recording of the evidence given by the complainant and two other drivers was made, in accordance with rule 38(d) of the Rules. After considering the evidence, the stewards decided against charging any of the drivers with an offence under those rules.

4. The complainant alleges that during the course of the inquiry, another driver repeated a defamatory comment which the other driver was alleged to have made about the complainant shortly after the race. By letter dated 1 September 1997, solicitors acting on behalf of the complainant applied to the agency under the FOI Act for access to the audiotape recording. The Chairman of Stewards of the agency refused access on the grounds that the document is exempt pursuant to clause 5(1)(a), 6(1)(a)(ii) and 8(1) of Schedule 1 to the FOI Act.

5. By letter dated 10 November 1997, the complainant's solicitor sought internal review of the agency's decision. By letter dated 25 November 1997, Mr Robert Bovell, Chief Executive and principal officer of the agency, confirmed the initial decision that the document is exempt. However, Mr Bovell varied the reason for that decision and claimed that the document is exempt pursuant to clauses 5(1)(a), 6(1)(a)(ii) and 8(2) of Schedule 1 to the FOI Act.

6. By letter dated 27 November 1997, the complainant's solicitors lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the original audiotape recording from the agency and directed my Legal/Investigations Officer to make additional inquiries to clarify aspects of this

complaint. Preliminary conferences were held with the parties to determine whether this complaint could be resolved through conciliation and negotiation. A resolution of the complaint could not be achieved and thus, on 21 January 1998, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons.

8. It was my preliminary view that the agency had not established a valid claim for exemption under clause 5(1)(a), 6(1) or 8(2) of Schedule 1 to the FOI Act. However, taking into account the document itself and other information on the agency's file, I considered that the document may be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, and I gave the parties my reasons for that view.

9. Subsequently, the agency withdrew its claims for exemption based on clause 5(1)(a), 6(1) and 8(2), but maintained a claim for exemption based on clause 5(1)(b). The complainant provided a further submission for my consideration, and did not withdraw his complaint.

THE DISPUTED DOCUMENT

10. The disputed document is an audiotape recording of the evidence given to the stewards at the inquiry held *in camera* on 14 July 1997. The persons present at the inquiry include the Stipendiary Steward in Charge, Mr Sullivan, Stipendiary Steward Butler, the complainant, and two other drivers.

THE EXEMPTION

11. Clause 5(1)(b) provides:

> *(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(b) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted."*

12. The scope and meaning of the exemption in clause 5(1)(b) has been the subject of three decisions by the Supreme Court of Western Australia: *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9, and *Police Force of Western Australia v Winterton* (unreported, Supreme Court of Western Australia, Library No. 970646, 27 November 1997). As Information Commissioner, I am bound by those decisions and must apply the law as interpreted by the Supreme Court when I am dealing with complaints under the FOI Act.

13. Clause 5(1)(b) requires that, in order to be exempt, the disclosure of the document in dispute could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law. Two questions arise from the terms of the exemption: firstly, whether the stewards' inquiry was an "investigation of any contravention or possible contravention of the law"; and, secondly, whether the disclosure of the disputed document could reasonably be expected to "reveal" that investigation following the interpretation of the phrase "reveal the investigation" by the Supreme Court.

INVESTIGATION OF A CONTRAVENTION OR A POSSIBLE CONTRAVENTION OF THE LAW

14. Based on the evidence before me, and my examination of the disputed document, it is my view that the inquiry was held by the stewards pursuant to their powers under rule 38 of the Rules to determine whether there had been a breach of a particular rule. The question then is whether the Rules are "law" for the purposes of clause 5(1)(b). Clause 5(5) of Schedule 1 to the FOI Act defines "the law" to include the law of this State. The law of this State clearly includes the written law and that term is defined in s.5 of the *Interpretation Act 1984* ('the Interpretation Act') to include subsidiary legislation. The term "subsidiary legislation" is also defined in the Interpretation Act to include, among other things, regulations, rules and by-laws, made under a written law and having legislative effect.

15. The *Western Australian Trotting Association Act 1946-1948* ('the WATA ACT') establishes the agency as a body corporate. Section 6 of that Act authorises the appointment of a committee to oversee the activities of the agency and s.7 gives the committee the power to make by-laws, the first of which were contained in Schedule 1 to the WATA Act. By-law 2 sets out the objects of the agency as being to "keep the sport of trotting clean and free from abuse and to regulate and control that sport". By-law 59 gives the committee the power to make, alter and repeal the Rules of Racing and by-law 60 states that the rules then in force should continue in force unless repealed or amended. By virtue of ss. 41 and 42 of the Interpretation Act, all regulations (defined in s.42(8) to include rules, local laws and by-laws) must be published in the *Government Gazette* and laid before both Houses of Parliament. Parliament may disallow any regulation and may amend, or substitute another rule for, any disallowed regulation. It is my understanding that the Rules are the relevant rules made by the committee under by-law 59 for the purpose of regulating trotting races.

16. In *Re U and Curtin University of Technology and another* (19 November 1997, unreported, D03097), at paragraphs 26 to 38, I considered the question of whether a Federal award made under the Commonwealth *Industrial Relations Act 1988* constituted a law for the purposes of clause 5(1)(b). After referring to the High Court cases of *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, *Ex Parte McLean* (1930) 41 CLR 472 and *Ansett Transport Industry (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, and the relevant provisions of the legislation and the award itself, I concluded that the Federal

award in question was a manifestation of the power given in the *Industrial Relations Act 1988* to make such awards and that a breach of the award would be, by the force of law given to it by the *Industrial Relations Act 1988,* a breach of the law.

17. In the *Clyde Engineering* case, Isaacs J stated, at 494 that:

> *"… if Parliament, unable or unwilling – it matters not which – to legislate in detail or with reference to a specific instance, but having authority to empower, does empower a named functionary to formulate what he thinks a proper rule, Parliament, it may be, hedging his authority with whatever principles or conditions it pleases, his formulation, though not a law, may be adopted by Parliament so as to be law. The legislative adoption of the formulation is itself legislation on the subject matter, and the formulation is then part of the law, not by force of the formulation, but by force of the adoption."*

18. In *Ex Parte McLean*, at page 479, Isaacs C J and Starke J, in their joint judgment, said in reference to a Federal award, *"… once it is completely made, its provisions are by the terms of the Act itself brought into force as part of the law of the Commonwealth."* At page 480, Rich J stated:

> *"the Commonwealth* Conciliation and Arbitration Act *confers upon the tribunal a power, and the award embodies the exercise of that power … And as in the case of other powers the efficacy and legal result of the exercise of the discretion is derived wholly from the instrument creating the power to which the exercise is referred and attributed."*

19. By analogy, it appears to me that the Rules made under the by-laws contained in the first Schedule to the WATA Act are clearly an exercise of the power given by the WATA Act to make such Rules, and are thereby given the force of law. Further, the rules must be laid before the Parliament and through that process are, in my view, essentially adopted by the Parliament so as to be law. Accordingly, in my view, the Rules fall within the definition of "the law" in clause 5(5).

20. I am strengthened in that view having considered the decision of the Supreme Court of Western Australia in *Harper v Racing Penalties Appeal Tribunal of Western Australia and Others* (unreported; Supreme Court of Western Australia; Library No. 930738.1; 26 November 1993). In that case, Kennedy J, considering the availability or otherwise of a defence of honest and reasonable but mistaken belief, said:

> *"The provisions of Chapter V of the Criminal Code are expressed by s36 to "apply to all persons charged with any offence against the statute law of Western Australia". The first question is whether the applicant was relevantly charged with any "offence against the statute law of Western Australia".*

> *The Rules of Trotting, as indicated, were made under the powers conferred by by-law 59 of the by-laws contained in the first schedule to the Association's Act which were constituted by s7 of the Act the first by-laws of the Association and to which s36 of the Interpretation Act was applied. In the circumstances, it appears to me that it is fairly arguable that offences created by the Rules of Racing are offences against statute law of Western Australia within the meaning of s36 of the Code."*

21. For the foregoing reasons, an inquiry by the stewards into a possible contravention of those Rules appears to me to be an investigation into a contravention or a possible contravention of the law within the meaning of clause 5(1)(b) of Schedule 1 to the FOI Act.

22. It was submitted, on behalf of the complainant, after a discussion of the three decisions of the Supreme Court of Western Australia in which the interpretation and application of clause 5(1)(b) was considered, that the facts in the matter now before me are clearly distinguishable from those cases. It was submitted that:

> "[t]*here is no police investigation, risk of police investigation, no "large scale criminality", there is no "personal risk to the officers engaged in the investigation". There is no such risk of a person, upon revealing that they are under suspicion concealing or destroying evidence".*

23. It happens that the only three decisions of the Supreme Court dealing with clause 5(1)(b) involved police investigations and possible criminal offences. However, from that, it cannot be concluded that the exemption in clause 5(1)(b) applies only to police investigations and allegations of criminal conduct. In my view, there is nothing in the words of clause 5(1)(b), nor in the definition in clause 5(5), which limits the application of the exemption to investigations involving criminal or disciplinary laws.

REVEAL THE INVESTIGATION

24. In *Police Force of Western Australia v Kelly and another* (1996) 17 WAR 9, at 13, Anderson J said that in his view *"… documents which reveal that there is an investigation, the identity of the people being investigated and generally the subject matter of the investigation probably would satisfy the requirement stipulated by Owen J* [in *Manly*] *that the document "must reveal something about the content of the investigation"*. It is my view that disclosure of the disputed document in this instance would reveal that there had been an investigation, the identity or identities of the person or people being investigated and generally the subject matter of the investigation. Accordingly, I consider that disclosure of the disputed document could reasonably be expected to reveal the investigation of a possible contravention of the law in a particular case.

25. It was submitted on behalf of the complainant that he is already aware of the contents of the tape and requires only a few specific comments from that document, which comments would not reveal the investigation. Clearly, the complainant is already aware of the contents of the document. It is an audiotape

recording of an inquiry in which he participated and throughout which he was present and heard the evidence given. However, in *Kelly*'s case, Anderson J made it clear that documents can "reveal an investigation" even when the fact of the investigation has been revealed through other materials or the investigation has concluded. His Honour said, at page 11:

> *"I do not think that it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter. … in my opinion, the stipulation that matter, disclosure of which reveals an investigation, is exempt even after a prosecution of the offence investigated confirms the conclusion that should anyway be reached that cl 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard to the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached."*

26. Given that the disputed document is an audiotape recording of an inquiry in which the complainant participated and was present throughout, it seems to me to be unsatisfactory outcome that the tape recording should be exempt and this could well be an instance in which the agency could have exercised its discretion under s.3(3) of the FOI Act to give access to a document that is technically exempt.

27. However, as Information Commissioner, I do not have that power. If it is established that a document is an exempt document, s.76(4) of the FOI Act provides that I do not have power to make a decision to the effect that access is to be given to that document. That is, if an agency decides not exercise its discretion to release a document, but claims an exemption instead, I can only deal with the question of whether the document is exempt as claimed by the agency. The questions of whether disclosure would harm some essential public interest or whether disclosure would, on balance, be in the public interest do not arise in the matter before me.

28. The decisions of the Supreme Court, cited in paragraph 12 above, all deal with the question of access to documents relating to investigations by the police concerning possible criminal and disciplinary offences. Clearly, there are public policy reasons why the exemption in clause 5(1)(b) and the definition of "the law" in clause 5(5) should protect from disclosure the kinds of documents normally associated with such investigations.

29. In my view, the disputed document is at the lower end of the law enforcement scale. I do not consider that Parliament would have intended clause 5(1)(b) to protect documents that are only remotely connected with law enforcement, public safety and property security, as illustrated by the facts of this case. However, the remedy to that unsatisfactory situation lies with Parliament. I must apply the law as enacted by the Parliament and interpreted subsequently by the Supreme Court.

Access to edited copy

30. The complainant's solicitor has submitted that the disputed document be released to the complainant in edited form in accordance with s.24 of the FOI Act. The complaint's solicitor stated:

> *"The Applicant is aware of the contents of the tape and requires only a few specific comments from that document. These comments do not, in our submissions* (sic) *reveal the investigation".*

31. Section 24 of the FOI Act states:

> ***"Deletion of exempt matter***
>
> ***24****. If -*
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> *(a) the access application requests access to a document containing exempt matter; and*
>
> *(b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
>
> *(c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*
>
> *the agency has to give access to an edited copy even if the document is the subject of an exemption certificate."*

32. The application of s.24, and particularly the qualification contained in s.24(b), was discussed by Scott J in *Police Force of Western Australia v Winterton.* At page 16 His Honour stated:

> *"It seems to me that the reference to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible."*

33. I note that the complainant is seeking access to only a few specific comments from the disputed document. I have considered whether it is appropriate to edit the disputed document in that manner. In doing so I must firstly determine

whether the specific comments sought by the complainant are themselves exempt. If they are not exempt, I must consider whether the editing which would be necessary is so substantial as to render the remaining document misleading or unintelligible.

34. For the reasons given above I am of the opinion that the whole of the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. I have examined the specific comments sought and, in my view, those comments refer to and thus reveal the investigation being conducted by the stewards into a possible contravention of the Rules.

35. Even if I had concluded that the specific comments were not exempt, I do not consider it to be practicable to edit the disputed document. To do so would require the deletion of almost all of the record and such deletion would not be of a minor or inconsequential nature. The balance of the document may, in my view, be misleading or unintelligible and could be described in similar terms to those used by Scott J as "making little or no sense".

CONCLUSION

36. In my view, the disclosure of the disputed document could reasonably be expected to reveal the investigation carried out by the stewards into a possible contravention of the Rules. The fact that the complainant was present at the inquiry and was therefore aware of the investigation and the evidence given is, in accordance with the comments in *Kelly*'s case, irrelevant in considering whether the exemption applies. Therefore, I find that the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

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