WAROA AND RACING/GAMING

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: 95189 Decision Ref: D01496

Participants:

Western Australian Racehorse Owners' Association
Complainant

- and -

Office of Racing and Gaming
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - whether the Western Australian Trotting Association is an agency as defined in the FOI Act - clause 1 - Cabinet and Executive Council - clause 4 - commercial or business information - adverse effect on commercial or business affairs - public interest factors for and against disclosure - clause 6 - deliberative processes - whether disclosure contrary to the public interest - clause 8 - confidential communications.

Freedom of Information Act 1992 (WA) ss. 4, 11, 33(3), 69(2), 69(4), 72(1)(b), 75(1), Schedule 1 clauses 1, 4(3), 6, 8(2), Schedule 2 Glossary Clause 1.
Freedom of Information Act 1982 (C'wlth) s. 36(1)(A).
Freedom of Information Act 1992 (Qld) Section 9.
Western Australian Trotting Association Act 1946 (WA) Section 3, First Schedule, Clause 2 of by-laws.
Interpretation Act 1984 (WA) Section 5.

Thompson v Federal Commissioner of Taxation (1959) 102 CLR 315.
Re English and Queensland Law Society (Information Commissioner, Qld, 4 August 1995, unreported).
Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588.
Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).

DECISION

The decision of the agency is set aside. In substitution it is decided that the matter described in paragraph 47 of this decision is exempt under clauses 4(3) and 6(1) of Schedule 1 to the *Freedom of Information Act 1992*, and that the disputed documents are not otherwise exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

1 March 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Office of Racing and Gaming ('the agency') to refuse the Western Australian Racehorse Owners' Association ('the complainant') access to two documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').

2. On 5 April 1995, Mr John McCormick, President of the complainant, applied on behalf of the complainant to the agency under the FOI Act for access to copies of *"...all reports and information that were used by the Hon. G M Evans MLC and Minister for Racing and Gaming, to persuade the Government in May* [1994]*, to peg the distribution of TAB profits to 65% Racing: 35% Trotting."*

3. The agency identified 20 documents as falling within the scope of the complainant's access application. On 1 June 1995, Ms Maxine Sclanders, Director of Racing in the agency, granted the complainant access to 15 documents and access to an edited copy of one document. However, access to the 4 remaining documents was refused on the ground that those documents were exempt under clause 1 of Schedule 1 to the FOI Act. The agency had consulted with the Western Australian Trotting Association ('the WATA'), as a third party, and deferred giving the complainant access to the documents to enable the WATA to exercise the rights of review under the FOI Act, in respect of two documents which had been created by the WATA.

4. On 7 July 1995, solicitors for the WATA applied to the agency for internal review of the agency's decision in respect of the two documents about which it had been consulted. On 27 July 1995, Mr Barry Sargeant, Executive Director of the agency, varied the agency's initial decision and decided that both documents are exempt under clauses 4 and 6 of Schedule 1 to the FOI Act.

5. On 25 September 1995, the complainant sought external review by the Information Commissioner in respect of the decision made by Mr Sargeant.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 4 October 1995, I notified the agency that I had received this complaint. Pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I sought and obtained the production to me of the originals of the documents in dispute, together with the agency's FOI file maintained in respect of this matter.

7. On 18 October 1995, the WATA sought to be formally joined as a party to this complaint, pursuant to s.69(2) of the FOI Act. Although initially informed that it had been joined, the WATA's request raised the question, subsequently considered by me, of whether the WATA is an agency for the purposes of the FOI Act and therefore not entitled to be joined as a party to the complainant. Section 33(3) of the FOI Act precludes an agency from being a third party to an access application and, consequently, a party to a complaint or appeal.

8. I formed a view that the WATA may be an agency as defined in the FOI Act and therefore not entitled to be joined. I informed the WATA, through its solicitors, of that view and my reasons for that view and invited it to make submissions on the point. However, the WATA chose to make no submissions in respect of that matter, other than to make the bald assertion that it is of the view that it is not an agency. Accordingly, for the reasons given in paragraphs 12-24 below, my view remains that the WATA is an agency for the purposes of the FOI Act and is not, therefore, entitled to be joined as a party to the complaint and has not been joined.

9. However, I am empowered by s.69(4) to obtain information or receive submissions from a person or body that might be affected by my decision on the complaint. Accordingly, I have accepted and considered the WATA's submissions to me in respect of the exempt status or otherwise of the documents and have taken those submissions into account in reaching my decision.

10. On 6 December 1995, after examining the disputed documents and considering the submissions and other documents provided to me by the parties and the WATA, including the WATA's submission to the agency supporting its request for internal review, I provided the parties and the WATA with my preliminary view and reasons for that view. It was my preliminary view that neither the agency nor the WATA had established that the disputed documents were exempt as claimed. After informing the parties of my preliminary view, I received a further submission from the WATA and I requested additional information from the agency and some information from the Minister for Racing and Gaming ('the Minister'), which was provided as background information to assist in my deliberations.

11. The agency maintains its claims that the disputed documents are exempt under clauses 4 and 6 of Schedule 1 to the FOI Act. The WATA claims that the disputed documents are exempt under clauses 1, 4, 6 and 8 of Schedule 1 to the FOI Act. The WATA also claims, in the alternative, that both documents are outside the ambit of the access application because they were not "used" by the Minister to persuade the government to peg the distribution profits of the Totalizator Agency Board ('the TAB') at the current level. That alternative claim is dealt with first, at paragraphs 25-29 below.

Preliminary issue - the WATA

12. The reasons for my view that the WATA may be an agency are as follows. The word "agency" is defined in clause 1 of the Glossary in Schedule 2 to the FOI Act to mean:

> *"(a) a Minister; or*
>
> *(b) a public body or office..."*

"Public body or office" is also defined in clause 1 of the Glossary to mean:

> *"(a) a department of the Public Service;*
>
> *(b) an organization specified in column 2 of the Schedule to the Public Service Act 1978;*
>
> *(c) the Police Force of Western Australia;*
>
> *(d) a municipality or regional council established under the Local Government Act 1960;*
>
> *(e) a body or office that is established for a public purpose under a written law;*
>
> *(f) a body or office that is established by the Governor or a Minister; or*
>
> *(g) any other body or office that is declared by the regulations to be a public body or office being -*
>
> *(i) a body or office established under a written law; or*
>
> *(ii)..."*

A body must fall within one of those definitions to be subject to the provisions of the FOI Act.

13. It is clear that the WATA does not fall within the definitions provided by paragraphs (a), (b), (c), (d), (f), or (g) of the definition. However, consideration of the circumstances of the establishment of the WATA indicates that it may be an agency within the terms of paragraph (e) of the definition.

14. The WATA is a body corporate constituted as such under section 3 of the *Western Australian Trotting Association Act 1946* (the WATA Act). The WATA Act constitutes and incorporates the WATA, and declares its objects, functions and powers. As a result of the WATA Act, the Western Australian Trotting Association (Incorporated) as constituted under the *Associations Incorporation Act 1895* ceased to exist, and its incorporation was dissolved.

15. The First Schedule to the WATA Act contains the by-laws of the WATA. Clause 2 of the by-laws for the WATA ('the by-laws') states that *"The main object of the Association shall be to foster and extend the sport of trotting throughout Western Australian and the importation and breeding of trotting horses, and to keep the sport of trotting clean and free from abuse, and also to regulate and control that sport wherever carried on in the State."* Clause 2 of the by-laws also provides the further objects and powers of the WATA.

16. Paragraph (e) of the definition of "public body" in the FOI Act requires that the relevant body be *"established for a public purpose under a written law."* The term "written law" is defined in section 5 of the *Interpretation Act 1984* ('the Interpretation Act') to mean, *inter alia*, *"...all Acts for the time being in force and all subsidiary legislation for the time being in force"*. The word "Act" is also defined in section 5 of the Interpretation Act to include *"an Act passed by the Parliament of Western Australia"*.

17. The WATA Act is clearly a "written law" within the definition in the Interpretation Act. The question then arises as to whether the WATA can be said to be established under the WATA Act. The word *"under"* is defined in section 5 of the Interpretation Act to include, in relation to a written law or a provision of a written law, *"by"*, *"in accordance with"*, *"pursuant to"* and *"by virtue"*.

18. The WATA is incorporated and constituted under the WATA Act. By virtue of that, I am of the view that it can be said that the WATA is established under a written law, namely, the WATA Act. For the purposes of the definition in paragraph (e) and, thus, of the definition of the term "public body or office" in the FOI Act, I am satisfied that the WATA, which is constituted under the WATA Act, can be said to be established under that written law.

19. In the event that the WATA is a body established under a written law, the question to be determined is whether the WATA is established for a "public purpose". The concept of what is a "public purpose" has been discussed in various contexts in a number of decisions. For example, in the decision in *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315, the High Court considered that bodies can be said to have been set up for a public purpose if the organisation is intended to benefit the public as a whole, or a substantial section of the public, provided that the organisation has not been set up for a private purpose such as the private profit or advantage of an individual or class of individuals.

20. The question has also been considered by the Queensland Information Commissioner in the context of the definition of an agency in the decision in *Re English and Queensland Law Society* (Information Commissioner, QLD, Decision No. 95022, 4 August 1995, unreported). In that decision, the Information Commissioner considered whether the Queensland Law Society is an agency for the purposes of the Queensland FOI Act. The definition of agency in that Act includes a "public authority", which is defined in section 9 to mean, *inter*

alia, "(a) a body (whether or not incorporated) that - (i) is established for a public purpose by an enactment..."

21. At paragraph 74 of the decision, the Information Commissioner stated that he considers that the meaning of the phrase "public purpose" in the Queensland FOI Act is relatively straightforward. He said:

> *"The word "purpose" directs attention to the objects or aims for which a body has been established as evidenced by the relevant powers, functions or duties conferred on it by Parliament. The word "public" imposes a requirement that a purpose be one for the benefit of members of the community generally (or a substantial segment of them, eg those who have dealings with solicitors)."*

22. The Information Commissioner also discussed the inclusion of the word "a" in the phrase "for a public purpose." He considered, at paragraph 78, that the effect of this is that the correct test to be employed is "*whether at least one of the major purposes for its establishment (as distinct from minor or ancillary purposes) is a public purpose*." I agree and accept that to be the correct test for Western Australia also.

23. In the case of the WATA, its main object is clearly stated in the by-laws. In my view, that object is a "major purpose" as discussed in the Queensland Information Commissioner's decision of *Re English*, discussed above. Therefore, the question is whether the main object can correctly be categorised as a purpose for the benefit of the public.

24. In my view, the main object of the WATA is wider than simply creating a benefit for members of the WATA. By focussing on the purpose of fostering and extending the sport of trotting throughout Western Australia, and to regulate and control the sport wherever carried on in the State, I consider that the main purpose for which the WATA is established under the WATA Act is a public purpose. The control and promotion of the sport of trotting throughout the State, without any limitation to any particular group of people or specific purpose, can, in my view, be seen to be for the benefit of the public generally, so as to be a "public purpose" within the meaning of the FOI Act. The fact that others of the stated objects of the by-laws are directed more at benefiting the members and officers of the WATA does not detract from the main object of the WATA. Accordingly, I am of the view that the WATA is within the definition of paragraph (e) of "public body or office", and is therefore an agency within the meaning of the FOI Act so as to be subject to the FOI Act.

Documents outside the ambit of the access application

25. The FOI Act creates a legally enforceable right of access to documents held by State and local government agencies other than the exempt agencies listed in Schedule 2 to the FOI Act. This is a general right given to each person without any requirement of "standing". Generally speaking, the right of access does not

require an applicant to establish any antecedent reasons for seeking access and the right is not affected by either the reasons given or by an agency's belief as to what those reasons might be. However, it is essential for an applicant to supply as much information as possible to enable the relevant document to be identified by an agency.

26. The requirement to identify a requested document with some particularity often presents a difficulty at the outset for applicants who may be unfamiliar with an agency's records management system. However, an agency has a duty to consult with an applicant in order to narrow the scope of the request and there are other duties contained in s.11 which require an agency to assist an applicant to make an application that conforms with the requirements of the FOI Act. As long as an agency understands, in general terms, the type of document or information that is required, the characterisation of a document as falling within the scope of an access application is not a question of statutory interpretation, but a decision requiring common sense that should be made in accordance with the legislative intent of the FOI Act, and with the principles of administration contained in s.4 of that Act, in mind.

27. I am informed by the Minister that he does not recall ever having seen the documents, although he may have. However, the agency informed me that the Minister had been provided with copies of the disputed documents in 1993 and there is evidence in the documents produced to me which suggests that is the case. Indeed, Document 19, being one of the disputed documents, is addressed to the Minister. Further, the agency was of the view that, as the documents had been in the possession of the Minister for the purpose of providing him with advice prior to him taking a submission to Cabinet for a decision on the distribution of TAB profits, and as the agency understood that the Minister had actually read them, it was likely that both documents had been "used" by the Minister for that purpose. I am informed by the Minister that he does not recall ever having seen the documents, although he may have.

28. I do not find any fault with the findings of the agency on that point. Even if they were only used by the Minister to inform himself of the issues before taking any action or by the agency in preparing the Cabinet submission on the issue for the Minister to take forward to Cabinet, they could, on a broad interpretation of the wording of the access application, be said to have been used by the Minister for the purpose described. Further, as the distribution of TAB profits was changed as a result of a Cabinet decision in April 1994, I consider it quite likely that the disputed documents formed part of the background information upon which the Minister, either himself or through the agency, based the necessary submission to Cabinet.

29. For those reasons, I reject the WATA's claims that the disputed documents are outside the ambit of the access application. Accordingly, I consider the decision of the agency to identify Documents 19 and 20 on its schedule as being documents of the agency which are within the ambit of the access application and to which the complainant is entitled to exercise his right of access under the FOI Act, subject to any valid claims for exemption, to be correct.

THE DISPUTED DOCUMENTS

30. There are two documents in dispute between the parties. Document 19 on the agency's schedule is dated 16 March 1993 and entitled *"A Case for the Review of the TAB Distribution Formula between the WA Trotting and Galloping Codes"*. The agency claims that Document 19 is exempt under clauses 4(3) and 6(1) of Schedule 1 to the FOI Act. The WATA claims that Document 19 is exempt under clauses 1, 4, 6 and 8(2) of Schedule 1 to the FOI Act.

31. Document 20 on the agency's schedule is dated 23 July 1993 and entitled *"Funding for the WA Racing Industry, WATA Comment upon a Paper Prepared by the Office of Racing and Gaming"*. Accompanying Document 20 is a letter of transmittal to the agency marked "Confidential" from the Chief Executive of the WATA. The letter of transmittal indicates that Document 20 was prepared in response to a discussion paper prepared by the agency on the matter of the TAB. It is the submission of the agency that Document 20 and the covering letter are exempt under clause 4(3) whilst the WATA claims that those documents are exempt under clauses 1, 4, 6, and 8(2) of Schedule 1 to the FOI Act.

THE EXEMPTIONS

(a) Clause 1 - Cabinet and Executive Council

32. Clause 1 of Schedule 1 to the FOI Act provides:

> ***"1. Cabinet and Executive Council***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it -*
>
> *(a) is an agenda, minute or other record of the deliberations or decisions of an Executive body;*
>
> *(b) contains policy options or recommendations prepared for possible submission to an Executive body;*
>
> *(c) is a communication between Ministers on matters relating to the making of a Government decision or the formulation of a Government policy where the decision is of a kind generally made by an Executive body or the policy is of a kind generally endorsed by an Executive body;*
>
> *(d) was prepared to brief a Minister in relation to matters -*

(i) prepared for possible submission to an Executive body, or

(ii) the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body;

(e) is a draft of a proposed enactment; or

(f) is an extract from or a copy of, or of part of, matter referred to in any of paragraphs (a) to (e).

Limits on exemptions

(2) Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless -

(a) its disclosure would reveal any deliberation or decision of an Executive body; and
(b) the fact of that deliberation or decision has not been officially published.

(3) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1) (f), the original matter, came into existence before the commencement of section 10 and at least 15 years have elapsed since it or the original matter (as the case may be) came into existence.

(4) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1) (f), the original matter, came into existence after the commencement of section 10 and at least 10 years have elapsed since it or the original matter (as the case may be) came into existence.

(5) Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body."

33. It is the submission of the WATA that the words of clause 1(1) make it clear that the exemption applies if the disclosure of the matter would "*reveal the deliberations or decisions of an Executive body"* and that no more needs to be established in order for the exemption to apply. Further, it is the submission of the WATA that Documents 19 and 20 are exempt under clause 1 because their disclosure would reveal a deliberation or a decision of an Executive body, namely, Cabinet. It is also the submission of the WATA that it follows directly from the ambit of the request that, if the Minister used the documents to

persuade Cabinet to alter the TAB distribution profit, then the documents must fall within the description of exempt matter in clause 1.

34. I have examined Documents 19 and 20. In my view, neither of those documents contains any information that would reveal a deliberation or a decision of Cabinet or any other Executive body. The Cabinet decision in respect of the TAB redistribution of profits is contained in a document of the agency to which access has been refused. That document is not the subject of the complaint before me. Documents 19 and 20 contain information about sections of the racing industry in Western Australia and an explanation of the views of one section of that industry on what needs to be done to maintain its viability in the future. In my view it does not follow from the fact that documents are received by a Minister, and that a decision is made by Cabinet on matters related to the same subject matter, that the documents themselves necessarily contain exempt matter under clause 1 of Schedule 1 to the FOI Act.

35. There is no evidence before me that any of the matter contained in either of the disputed documents was considered by Cabinet, nor is there anything in those documents which reveals what was considered by Cabinet in reaching its decision. Accordingly, their disclosure could not in any way reveal the deliberations or decisions of Cabinet or any other Executive body. Therefore, I find that neither document is exempt under clause 1.

(b) Clause 4 - Commercial or business information

36. Clause 4, so far as is relevant, provides:

> ***"4. Commercial or business information***
>
> *(1)...*
> *(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*
>
> *(b) could reasonably be expected to destroy or diminish that commercial value.*
>
> *(3) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
>
> *(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future*

> *supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemptions***
>
> *(4) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
>
> *(5) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
>
> *(6) Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
>
> *(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

37. Clause 4 deals with three different types of business or commercial information which may be exempt. As a matter of statutory construction, the same information cannot be exempt under more than one of those sub-clauses. Sub-clause (2) is expressly stated not to apply to matter with which clause 4(1) is concerned, that is, trade secrets, and clause 4(3) is expressly stated, in paragraph (a), not to apply to matter of the kind described in sub-clauses (1) and (2).

38. The agency claims that the disputed documents are exempt under clause 4(3). The WATA submits, in its request for internal review which formed part of the submissions to my office, that the disputed documents are exempt under clause 4. However, the WATA did not particularise which parts of those documents are claimed to be exempt under clause 4(2) and which are claimed to be exempt under clause 4(3) (there being no justification, in my view, for a claim under clause 4(1)), although the substance of the WATA's submission, in my view, points to a general claim for exemption under clause 4(3).

39. The exemption in clause 4(3) may apply if the information concerns the business, commercial or financial affairs of the WATA and, if disclosed, could reasonably be expected to have an adverse effect on those affairs, or prejudice the supply of that kind of information to the Government or an agency in the future. Further, the limitation in clause 4(7) means that, if a *prima facie* claim for exemption is made out, there is still a balancing test to be applied in considering whether disclosure of that kind of business information would, nevertheless, be in the public interest.

40. I am satisfied, from my own examination of the disputed documents, that they contain information concerning the business and financial affairs of the WATA.

In order to satisfy the requirements of paragraph (b) of clause 4(3), the WATA claims that Documents 19 and 20 contain:

> *"(a) detailed analysis of decisions made by the Government which have had an impact on the viability of the WATA's business, for example, the establishment of greyhound racing in Western Australia, the establishment of the Burswood Casino and the amendments to the TAB distribution formula;*
>
> *(b) forecasts of the likely projected financial position of the WATA until the financial year 1998/1999;*
>
> *(c) information which may have an adverse effect upon the willingness of persons to invest and participate in the WATA's business;*
>
> *(d) comments upon market competitors which may be regarded in an unfavourable light by those competitors if released, thereby leading to an adverse effect upon the funds received by the WATA by way of sponsorship and advertising;*
>
> *(e) information which, if released, may damage the WATA's relationship with existing business partners, such as the greyhound racing industry and the WA Turf Club due to the adverse effects of releasing the information outlined in paragraphs (a) to (d) above; and*
>
> *(f) information as outlined in sub-paragraphs (a) to (d) above, which if released, is likely to be used by the WATA's market competitors to advance the interests of those competitors to the detriment of the WATA."*

41. It is also the submission of the WATA, based on the alternative limb of paragraph (b) of clause 4(3), that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. Solicitors for the WATA said that *"...it is not in the WATA's interests to disclose confidential commercial information to a Minister to consider before 'the Government' makes a decision on policy matters that will affect the WATA if that confidential commercial information is to be made available to the scrutiny of market competitors. This in turn would prejudice effective policy making by Government as parties will not make full disclosure of all relevant matters when making submissions to it and as a corollary Government will not be appraised* [sic] *of all relevant information prior to making its decision."*

42. In my view, the words "adverse effect" in paragraph (b) in this instance, refer to an adverse effect on the business, commercial or financial affairs of the WATA to which the information relates. As I stated in paragraph 38 above, the WATA did not direct me to any particular information in the disputed documents which it claims would produce an adverse effect if disclosed. Much of the information in the disputed documents is information that is already in the public domain

because it is contained in public documents or annual reports of the WATA, the Western Australian Turf Club and the Western Australian Greyhound Racing Association. However, the WATA claims that clause 4(3) applies to all matter in the disputed documents including the comments, criticisms and opinions in those documents. That is, it is the submission of the WATA that those parts of the disputed documents that comprise the commentary, and not merely the tables, facts and figures and statistical data, are matter concerning its business, commercial or financial affairs which, if disclosed, could reasonably be expected to have either of the prejudicial effects contained in paragraph (b) of clause 4(3).

43. I am not persuaded that parts of the disputed documents which may be conveniently described as commentary, can also be described as matter that relates to the business, commercial or financial affairs of the WATA. In my opinion, the parts of the disputed documents that contain matter fitting the description in paragraph (a) of clause 4(3) are, generally speaking, information that is already in the public domain or contained in published reports that are public documents. In effect, the WATA is seeking to exempt from disclosure under clause 4(3) information consisting of its own views about how the racing industry operates in Western Australia and suggestions to ensure the viability of the WATA's position as a part of that industry. Whilst that information may concern the business affairs of the WATA, I do not consider that commentary of that nature is the kind of sensitive business information that clause 4(3) is designed to protect from disclosure.

44. Further, I am not convinced that commentary of the kind described in paragraph 28 above, which is information that the WATA provided in an endeavour to persuade the agency or the Government to adopt a particular line of action in redistributing the TAB profits would not be provided in the future by any person or organisation seeking to obtain a Government decision in his, her or its favour.

45. In my view, it could not reasonably be expected that the disclosure of opinions held and commentary by the WATA in 1993, even where those comments might be critical of others, could have the adverse effects claimed by the WATA and quoted in paragraph 25 above. In any event, there is no information before me that supports the claims of the WATA in that regard, nor do the documents themselves support that view. In that respect, I agree with the access applicant who said, *inter alia*, that there is no "market" for "gambling services" but that the racing industry has a particular and loyal following and the trotting industry has a different particular and loyal following; the timing of racing does not conflict with trotting events occurring on different days to each other; an analysis of past decisions of Government could not reasonably be expected to have an adverse effect on business affairs of the WATA because those events occurred in the past; the comments about sponsorship and advertising being adversely affected by disclosure are purely speculative and no factual basis for those claims has been established. Accordingly, I find that Document 20 is not exempt under clause 4(3) of Schedule 1 to the FOI Act.

46. However, some matter in Document 19 consists of a projected financial analysis of the affairs of the WATA for the years 1996/97, 1997/98 and 1998/99. I

consider that information which appears on pages 25, 43 and 44 of Document 19 to be confidential commercial information, relating directly to the business and commercial affairs of the WATA. In my view, the disclosure of that kind of information could reasonably be expected to adversely affect the future business plans of the WATA if potential sponsors decide to invest or not invest in the WATA's business on the strength of the published data which is purely speculative. In respect of that information, I consider there are real and substantial grounds for believing that disclosure could be expected to have an adverse effect on the business affairs of the WATA.

47. I recognise that there is a public interest in persons being able to exercise their right of access under the FOI Act, and people being able to be informed of the basis and materials upon which Government decisions, particularly those affecting them, have been made. Those public interests are, in my view, satisfied in this instance by disclosure of Document 20 and an edited copy of Document 19 with the sensitive commercial information of the WATA deleted. I also consider that there is a public interest in a business being able to maintain confidentiality with respect to certain of its commercial and financial information. In balancing those competing interests, it is my view that the latter interest should prevail. Accordingly, I find the financial projections for the years 1996/97, 1997/98 and 1998/99 appearing on pages 25, 43 and 44 of Document 19 to be exempt matter under clause 4(3) of Schedule 1 to the FOI Act, but that Document 19 is not otherwise exempt under clause 4 for the reasons given in paragraphs 23-30 above.

(c) Clause 6 - Deliberative processes

48. Clause 6 of Schedule 1 to the FOI Act provides:

> ***"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."*

49. I have discussed the meaning and scope of the exemption in clause 6(1) in a number of my formal decisions. To establish an exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of that exemption. If the disputed documents contain matter of a type described in paragraph (a), then it is necessary to consider the requirements of paragraph (b), that is, whether disclosure of the documents would, on balance, be contrary to the public interest.

50. As I have said before, the meaning of the phrase "deliberative processes" has been considered in a number of cases based on the equivalent section in the Commonwealth *Freedom of Information Act 1982* (s.36(1)(a)). In my view, the following passage in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 in relation to the equivalent Commonwealth provision applies to a consideration of clause 6(1) of Schedule 1 to the FOI Act in Western Australia and the scope of the exemption. In that case, the Commonwealth Administrative Appeals Tribunal said, at paragraphs 58-60:

> *"58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "the action of deliberating; careful consideration with a view to decision": see the Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...*
>
> *59. It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...*
>
> *60. It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."*

51. Although the Minister could not recall having seen the documents, and does not consider them to have formed part of his deliberative process, I am satisfied, from my examination of the disputed documents, that they each contain information of a type described in paragraph (a) of clause 6, that is, opinion obtained in the course of, or for the purposes of, the deliberative processes of the Minister, or consultation that has taken place in the course of, or for the purposes of, that process. At least one of them is a response, sought by the agency, to its discussion paper and was clearly obtained in the course of the agency's deliberative process on the issue at hand. Both were obtained in the course of the Minister's deliberative process, whether or not they ultimately influenced his decision. Therefore, I am satisfied that both documents satisfy the requirements of paragraph (a) of clause 6.

52. The agency determined that it was contrary to the public interest to disclose Documents 19 and 20 because it decided that the public interest is best served by protecting the commercial and business interests of the WATA and in the proper functioning of the deliberative processes of the Government, a Minister or an agency. The WATA, on the other hand, claims that disclosure would adversely affect the proper workings of Government and this outweighs other public interest considerations in this instance.

53. In my view, the purpose of the exemption in clause 6 is to protect the integrity of the deliberative processes of the Government, a Minister or an agency. As I have said before, I recognise that there is a public interest in the Government, a Minister or an agency having access to the widest possible range of information and advice in order that it may carry out its functions and make informed decisions on matters that affect the community as a whole.

54. There is also a public interest in protecting from disclosure the personal and sensitive business information of individuals and organisations which may be contained in documents held by State and local government agencies. That public interest in both protection, where necessary, of the privacy and livelihood of parties dealing with government, and in maintaining the supply of such information to government, ensures fully-informed decision-making. The disputed documents in this instance do not, in my view, contain any exempt personal information, nor are they claimed by any party to contain personal information. They do, however, contain some matter which I consider to be information relating to the business, commercial and financial affairs of the WATA of a kind that there is a public interest in protecting from disclosure. As I have already found that matter, which I have identified in paragraphs 31 and 32 above, to be exempt matter under clause 4(3), I need not determine its exempt status or otherwise under clause 6. However, for the reasons given in paragraphs 31 and 32 above, I also consider that matter to be exempt under clause 6(1).

55. However, I do not consider the balance of the business information in the documents to be of that nature and, as I have said in paragraph 27 above, much of it is information that is already in the public domain. That kind of information, in my view, may be subject to the limitation in clause 6(3) which provides that

matter is not exempt matter under clause 6(1) if it is merely factual or statistical information.

56. Balanced against those public interests favouring non-disclosure, I also recognise that there is a public interest in members of the community having access to information about the processes of government decision-making in order that they may participate in those processes in accordance with democratic ideals. That public interest is an object served by the enactment of FOI legislation. In my view, the general right of access in the FOI Act should be given more weight by decision-makers than they have been prepared to give it to date.

57. Taking all of the competing public interests into account, including the fact that the decision on the redistribution of TAB profits was made by the Government in 1994, in my view, disclosure of the disputed documents would not, on balance, be contrary to the public interest. Accordingly, I find that Documents 19 and 20 are not exempt under clause 6(1) of Schedule 1 to the FOI Act.

(d) Clause 8 - Confidential communications

58. The WATA also claimed that the disputed documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8, so far as is relevant, provides:

> *"(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemption***
>
> *(3)...*
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

59. There are two parts to the exemption in clause 8(2) and both paragraphs (a) and (b) must be satisfied for a *prima facie* claim for exemption to arise. The WATA claims that Document 20 was sent to the agency under cover of a letter marked "Confidential" and, on that basis, it was given and received in confidence. In respect of Document 19, the WATA submits that it was handed to the Minister and that it was not intended for the public domain.

60. The mere fact of marking a document as confidential is not sufficient to establish the requirements of paragraph (a) of clause 8(2), although it is a relevant factor. To establish that a document is of a kind described in paragraph (a), it must be shown that it contains information that is confidential, that it was given to the agency in confidence and that it was received by the agency in confidence. There

is simply nothing before me, other than the claims of the WATA, to establish the confidential nature of the contents of the disputed documents, nor that it was obtained in confidence either by the Minister or the agency. As I have mentioned in paragraph 27 above, much of the information is already in the public domain. That information cannot, therefore, be considered confidential in nature.

61. The agency considered that the existence of Document 19 on its files suggested that that document was neither received nor kept by the Minister in confidence. I agree with that conclusion. Further, the agency decided that it was not bound by any obligation of confidence in respect of Document 20 merely because the letter of transmittal from the WATA was marked accordingly. There may be an argument that the Minister's having sent the documents to his department for its files need not necessarily destroy any confidentiality attaching to those documents. However, with no evidence before me of any understanding of confidentiality on the part of the Minister or the agency about the circumstances in which the documents were received, I cannot find that they were obtained in confidence.

62. For those reasons and from my own examination of the disputed documents, I am of the view that they do not contain information of a confidential nature obtained in confidence by the agency or by the Minister. Therefore, I am not convinced that the material before me satisfies the requirements of paragraph (a) of clause 8(2). Even if I were satisfied on that point, there is insufficient material before me to satisfy the requirements of paragraph (b) of that clause, other than, perhaps, in respect of the commercial information that I have already found to be exempt under clauses 4(3) and 6(1). In circumstances where an individual or a business is seeking to persuade the Government or an agency to adopt a particular course of action to the advantage of that individual or business, and information is supplied to Government, a Minister or an agency in support of that course of action, I consider it unlikely that such information, (other than some sensitive commercial information) would not be forthcoming in the future.

63. In order to displace the statutory right of access, an agency or a third party must establish a case for exempting from disclosure the particular documents to which access is sought. Whilst an agency or a third party is not required to establish a case for exemption on the balance of probabilities, there must be some material provided to me that is capable of supporting its claims. On this point I respectfully refer to the comments of Owen J. in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported). His Honour said, at p.44:

> *"How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some*

way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker."

64. On the material before me, including my own examination of the disputed documents, I am not satisfied that there are real and substantial grounds for believing that the ability of the Government, a Minister or the agency to obtain that kind of information in the future could reasonably be expected to be prejudiced by the disclosure of the disputed documents. However, I need not decide that point since the first limb of the exemption in clause 8(2)(a) is not established by the material before me. Accordingly, I find that Documents 19 and 20 are not exempt under clause 8(2) of Schedule 1 to the FOI Act.

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