

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

**File Ref: F2001087  
Decision Ref: D0342001**

Participants:

**Gordon Walliss Inglis**  
Complainant

- and -

**Western Australian Trotting  
Association**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to Minutes of committee meetings of the Western Australian Trotting Association – videotapes – audiotape - clause 3(1) – personal information – clause 3(6) – whether disclosure would, on balance, in the public interest – clause 7(1) – legal professional privilege – privileged communications.

*Freedom of Information Act 1992 (WA)* ss. 26, 74, 102(3); Schedule 1 clauses 3(1), 4(3), 6(1), 7 and 10(4).

*Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339

*Trade Practices Commission v Sterling* (1979) 36 FLR 244

## DECISION

The decision of the agency is varied. In substitution it is decided that:

- The matter deleted from Document 23 is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*;
- The matter in lines 4-7 of paragraph 2 of the resolution Item CIP/Ch.31 is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*; and

the balance of the disputed matter in Document 22 and the whole of Document 21 is not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

27 September 2001

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Western Australian Trotting Association ('the agency') to refuse Mr Ingliss ('the complainant') access to documents requested by him under the Freedom of Information Act 1992 ('the FOI Act').
2. The complainant runs a media company, which was contracted by the agency to make a documentary film on harness racing. There is a current dispute between the agency and the complainant, which is before the court. On 30 April 2001, the complainant made an application to the agency for access under the FOI Act to various documents relating to him or his business, including minutes of meetings held by the agency.
3. The agency granted the complainant access to two videotapes, but refused him access to 36 other documents on the grounds that those documents are exempt under clauses 4(3), 6(1), 7 and 10(4) of Schedule 1 to the FOI Act. The agency also refused access to the tape recording of a meeting held on 8 June 1999, on the ground that it was exempt under clauses 10(4) and 4(3). However, the agency also stated it could not find that particular tape and refused access to it under s.26 of the FOI Act. The agency's initial decision was confirmed following an internal review. On 12 July 2001, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

4. During the course of this review, I directed the Chief Executive Officer of the agency to provide me with information about the searches undertaken by the agency to locate the tape recording. The originals of the 34 documents containing minutes of the meetings of the agency described in the notice of decision dated 25 June 2001 were inspected and complete copies of those minutes were produced to me by the agency. I also informed the agency, having considered its notices of decision, that there was insufficient material before me to determine whether the agency's decision to refuse the complainant access to those under clauses 4(3), 6(1), 7 and 10(4) was justified.
5. Following consultations with my officers, the agency granted the complainant access to most of the requested documents, either in full or in part. After considering the material before me, on 11 September 2001, I informed the parties in writing of my preliminary view of this complaint, including my reasons.
6. I considered that parts of 3 documents remained in dispute between the parties. In respect of those parts, it was my preliminary view that the matter deleted from Document 23 may be exempt under clause 3(1); some matter deleted from page 2 of Document 22 may be exempt under clause 7; and Document 21 together with the balance of the matter deleted from Document 22 may not be exempt under clause 7.
7. The agency responded in writing with a further submission in support of its claim for exemption under clause 7. The complainant also responded in writing but did not withdraw his complaint.

## THE DISPUTED DOCUMENTS

8. Document 21 is the minutes of a meeting of a committee of the agency held on 29 June 1999. It contains statements to the effect that the document is subject to legal professional privilege and that it is also private and confidential. Document 22 is the minutes of a meeting of a committee of the agency held on 13 July 1999. The disputed matter consists of 2 lines on page 1 and part of one paragraph on page 2. Document 23 is the minutes of a meeting of a committee of the agency held on 3 August 1999.

## THE EXEMPTIONS

### (a) Clause 3 – Personal information

9. The agency claims that the information deleted Document 23 is exempt under clause 3(1), because it consists of “personal information” about a third party. Clause 3(1) of Schedule 1 to the FOI Act provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead). The phrase “personal information” is defined in the Glossary in Schedule 2 to the FOI Act as meaning information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead whose identity is apparent or can reasonably be ascertained from the information or opinion, or who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.
10. I have examined the information deleted from Document 23. In my opinion, it clearly consists of personal information, within the meaning of the FOI Act, about a third party from which the third party’s identity can be ascertained. That kind of information is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Having examined the information concerned, I am also of the view that none of the limits on exemption set out clauses 3(2)-3(5) applies to that information.
11. However, clause 3(1) is also subject to the limit on the exemption in clause 3(6), which provides that matter is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides that, if under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest. In this case, the onus is on the complainant to persuade me that disclosure of personal information would be in the public interest.
12. In response to my preliminary view, the complainant stated that it was impossible for him to comment regarding personal information about third parties when he did not know the identity of the third parties concerned, nor the type of information involved. However, I could not give him any more information without breaching my obligations under s.74 of the FOI Act not to disclose exempt matter.

### **The public interest**

13. The purpose of the exemption in clause 3 is to protect the privacy of individuals. The exemption in clause 3(1) is a recognition by Parliament of the fact that government agencies collect and hold a vast amount of important and sensitive private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause. In my view, the public interest in protecting privacy is very strong, and may only be displaced by some stronger countervailing public interest that requires the disclosure of personal information.
14. On the other hand, I also recognise that there is a public interest in access applicants being able to exercise their rights of access under the FOI Act and a public interest in ensuring an understanding of, and accountability for, the decision-making processes of State and local government agencies. In the circumstances of this complaint, I consider that the public interests favouring disclosure have been satisfied to some extent by the disclosure of documents to which access has been granted by the agency.
15. In balancing the competing public interests, I have given more weight to the public interest protecting privacy. I am not persuaded that there is any stronger countervailing public interest, which requires the disclosure of personal information about one person to another, in this case, to the complainant. Accordingly, I find that the information deleted from Document 23 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

### **(b) Clause 7 – Legal professional privilege**

16. Clause 7 provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. The common law principle is that confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings if the communication is made for the dominant purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339.
17. The disputed matter in Documents 21 and 22 is not matter of that kind. However, legal professional privilege also extends to other classes of documents including, among other things, notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on behalf of the client: *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-6.

### **The agency's submission**

18. The agency claims that Document 21 consists of the minutes of a meeting held between the agency, Channel 31 and the legal advisers of both those parties, at which oral communications were made concerning the harness racing program to be produced for the agency by the complainant. The agency submits that the circumstances of the oral communications were that both the agency and Channel 31

had a mutual interest in a harness racing program being broadcast on Friday evenings by Channel 31, a community television channel and, accordingly, the oral confidential communications are protected by legal professional privilege on the authority of the decision in *Trade Practices Commission v Sterling* (1979) 36 FLR 244. The agency also submits that Document 21 is exempt under clause 7 because the heading to that document states that legal professional privilege applies to that document. The agency submits that the disputed matter in Document 22 is exempt for the same reasons.

### Consideration

19. I have examined Document 21. I accept that it records very briefly the minutes of a meeting held between representatives of the agency and Channel 31 and legal advisers. However, I do not consider that Document 21 is a communication of the kind referred to in *Sterling's* case. Nothing on the face of that document or in the agency's submissions to me establishes that Document 21 is a communication of the kind to which legal professional privilege attaches. Even if the purpose of the meeting was to obtain legal advice, the document does not appear to me to be a record of that legal advice.
20. Further, simply typing a heading onto a document, to the effect that legal professional privilege attaches to it, does not mean that the document is privileged. If the document is not of a kind described in either the *Esso* case or in *Sterling*, then it is not privileged. Neither the document itself nor the submissions made by the agency persuades me that Document 21 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 21 is not exempt under clause 7.
21. In respect of the disputed matter on page 1 of Document 22, I do not consider that that matter is a communication of the kind referred to in *Sterling's* case, nor is it a record of legal advice. Accordingly, for similar reasons, I find that the disputed matter on page 1 of Document 22 is not exempt under clause 7.
22. However, I have reached a different conclusion in respect of the disputed matter on page 2 of Document 22. I am satisfied that that particular information contains a record of a privileged communication between the agency and its legal advisers which was itself privileged and which was made for the dominant purpose of giving or receiving legal advice. Therefore, it is my view that the information deleted from lines 4-7 of the relevant paragraph on page 2 of Document 22 would be privileged from production in legal proceedings on the ground of legal professional privilege, on the authority of the decision of Lockhart J in *Sterling's* case. Accordingly, I find that that matter is exempt under clause 7.

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