

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

**File Ref: F2016096
Decision Ref: D0162016**

Participants:

Nada Banovic and David Edwards
Complainants

- and -

**Racing and Wagering Western
Australia**
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – transcript of stewards’ inquiry – clause 3 – whether personal information – clause 3(6) – whether disclosure would, on balance, be in the public interest – whether public interest satisfied by public availability of Tribunal decision and provision of copy of relevant stewards’ findings to the access applicants – public interest factors for and against disclosure – section 74(1) – requirement not to disclose exempt matter when dealing with a complaint – section 102(3) – burden of proof.

Freedom of Information Act 1992 (WA): sections 10(1), 24, 74(1), 74(2) and 102(3);
Schedule 1, clauses 3, 4 and 8

Racing and Wagering Western Australia Act 2003 (WA)
Racing Penalties (Appeals) Act 1990 (WA)

DPP v Smith [1991] 1 VR 63

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

Police Force of Western Australia v Winterton (1997) WASC 504

DECISION

The agency's decision is varied. I find that the disputed document is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* (WA).

Sven Bluemmel
INFORMATION COMMISSIONER

31 October 2016

REASONS FOR DECISION

1. This complaint arises from a decision made by Racing and Wagering Western Australia (**the agency**) to refuse Ms Nada Banovic and Mr David Edwards (**the complainants**) access to a document under the *Freedom of Information Act 1992* (WA) (**the FOI Act**).

BACKGROUND

2. On 29 October 2015 the complainants applied to the agency under the FOI Act for 'all information on the transcript regarding stewards' inquiry'.
3. By notice of decision dated 5 January 2016 the agency decided to refuse the complainants access to the document on the grounds that it is not a document of an agency pursuant to section 10(1) of the FOI Act and, alternatively, the document is exempt under clauses 4 and 8 of Schedule 1 to the FOI Act.
4. On 2 February 2016 the complainants applied for internal review of the agency's decision. By letter dated 15 February 2016 the agency confirmed its decision.
5. By letter dated 22 March 2016 the complainants applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. Following my receipt of this complaint, the agency produced to me a copy of the disputed document together with its FOI file maintained in respect of the complainants' access application.
7. On 16 August 2016 my Principal Legal Officer (**PLO**) held a conciliation conference with the parties.
8. The agency agreed at the conciliation conference to review the disputed document and consider whether it could release that part of the disputed document relating to the complainants' evidence to the stewards' inquiry.
9. By letter dated 31 August 2016 the agency advised my PLO that, having reviewed the disputed document and considered the matter further, it decided that it could not release that part of the disputed document as

the transcript of the complainant's evidence contains predominantly personal information about individuals other than themselves, and the deletion of this information to overcome this issue would be considerable such that it would leave the document indecipherable.

THE DISPUTED DOCUMENT

10. The disputed document is a transcript of the proceedings of an agency's Stewards' Inquiry in relation to the export of horses from Western Australia to Singapore by a named individual. The inquiry took place over seven hearing days – 17 July 2013, 20 November 2013, 16 January 2014, 14 February 2014, 19 March 2014, 20 March 2014 and 30 June 2014. The transcript is approximately 850 pages in length.

11. The agency has claimed that the document is not a document of an agency and it can therefore refuse access to it under section 10(1) of the FOI Act. In the alternative the agency claims that the disputed document is exempt under clauses 4 and 8 of Schedule 1 to the FOI Act. For the reasons set out below, I do not need to consider section 10(1) of the FOI Act or either of the exemption clauses claimed.
12. In providing my decision, it is necessary that I describe certain matters in general terms only in order to avoid breaching my obligation under section 74(2) of the FOI Act not to reveal exempt matter.
13. Section 74(1) of the FOI Act requires the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for a decision. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 recognised the difficulties faced by complainants and the constraints placed on the Commissioner by such provisions in the FOI Act but took the view that those provisions should be construed strictly according to their tenor.
14. I have reviewed the disputed document carefully. Given the nature of the inquiry and its subject matter, and the persons whose personal information is given, it is apparent to me on its face that every page of the document contains personal information. I have therefore considered whether the document or any part of it is exempt under clause 3 and, if so, whether any of the limits on exemption apply.

CLAUSE 3 – PERSONAL INFORMATION

15. Clause 3(1) of Schedule 1 to the FOI Act provides that matter is exempt if its disclosure would reveal personal information about an individual (whether living or dead). In the Glossary to the FOI Act the term ‘personal information’ is defined to mean:

information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –

- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.*

16. Clause 3 and the relevant extract from the Glossary to the FOI Act are set out in full in the appendix to this decision.

The complainants’ submissions

17. The complainants’ submissions are set out in their letter to me seeking external review dated 22 March 2016 and in an email dated 27 October 2016 provided in response to my preliminary view letter dated 12 October 2016. In brief, the complainants submit as follows:

- The complainants' request concerns complaints made by them and others to the agency about the alleged unlawful transfer of horses to Singapore via a local trainer.
 - [Named individual] was disqualified for three years and his appeal against disqualification was dismissed.
 - The complainants seek a similar inquiry into the conduct of a [named individual] by the Malaysian Racing Authority.
 - The complainants believe that they need to provide evidence to the Malaysian Racing Authority to commence such an inquiry and they believe that the evidence they need is contained in the transcript.
 - The agency has, in separate correspondence, provided the complainants with certain information to assist them and has confirmed that, should a request be made by the Malaysian Racing Authority for information, the agency would consider providing a copy of the disputed document to it.
 - The public has a right to know that if they lodged a complaint, it was dealt with by the inquiry, and whether a complaint was an isolated case or a common occurrence within the industry.
 - There are systematic failings within the racing industry.
 - The public deserves transparency and accountability when dealing with a government agency.
18. On 6 July 2016 the complainants emailed my PLO copies of a number of news articles concerning [named individual], a link to the Racing Penalties Appeal Tribunal (**RPAT**) website and a link to a particular determination of RPAT.
19. The complainants claimed that certain information about a particular individual of interest to the complainants was available on social media and reported in the press. The complainants said that the agency was disinclined to release the disputed document because it would identify victims and witnesses, whereas the complainants contend that information about such people was in the public domain.

The agency's submissions

20. The agency's submissions are set out in its notices of decision dated 5 January and 15 February 2016. They refer specifically to section 10(1) of the FOI Act and clauses 4 and 8 of Schedule 1 to the FOI Act. Given that my view is that the disputed document is exempt under clause 3, I have not summarised or considered the agency's submissions in respect of section 10(1) or clauses 4 and 8.

The complainants' submissions

21. The complainants' submissions, including those made to me by email dated 27 October 2016 in response to my preliminary view letter dated 12 October 2016, do not make

reference to any relevant exemption clauses under the FOI Act but instead relate details of the personal dispute between themselves (and others) with named individuals and the complainants' endeavours to commence proceedings against a citizen of another country in a foreign jurisdiction.

Consideration

22. I have considered whether the disputed document is exempt under clause 3.

Clause 3(1) – Personal information

23. The definition of 'personal information' makes it clear that any information or opinion about a person whose identity is apparent – or whose identity can reasonably be ascertained from the information or opinion – is, on the face of it, exempt information under clause 3(1), subject to the application of the limits on exemption in clauses 3(2)-3(6). In other words, 'personal information' is information that identifies individuals. Having carefully reviewed the disputed document, I note that each of the approximately 850 pages of the document contains personal information.
24. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.
25. The disputed document is a verbatim record of the evidence of witnesses about their personal experiences with [named individual] and business transactions undertaken with him. As such it contains detailed information, including opinions, about people whose identities are apparent or can reasonably be ascertained from the information.
26. I also consider that the disputed information would, if disclosed, reveal personal information as defined in the FOI Act about other individuals. In my view, all of that information is, on its face, exempt under clause 3(1) of Schedule 1 to the FOI Act. I then consider whether any of the limits on exemption set out in clause 3(2)-3(6) apply. The only limitation that I consider may be relevant in this matter is clause 3(6).

Clause 3(6) – Public interest

27. Clause 3(6) provides that information is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under section 102(3) of the FOI Act, the onus lies with the complainants, as the access applicants, to establish that disclosure of personal information about third parties would, on balance, be in the public interest.
28. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the public interests for and against disclosure, weighing them against each other and deciding where the balance lies.
29. The term 'public interest' is not defined in the FOI Act, nor is it a term that is easily defined. However, it is not merely something that may be of curiosity to the public; rather, it is something which is of concern or benefit to the public.
30. In *DPP v Smith* [1991] 1 VR 63, at 75, the Victorian Supreme Court said:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ...

31. I understand that the complainants have a personal interest in the disclosure to them of the disputed document. However, the public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally, and whether that public benefit is sufficient to outweigh any public interest in the maintenance of a third party's personal privacy.
32. The complainants have also made submissions to me that there is a wider public interest in maintaining the standards of thoroughbred racing and the ethical conduct of trainers in Australia and overseas.
33. Stewards' inquiries are formal disciplinary proceedings held under section 45 of the *Racing and Wagering Western Australia Act 2003* and the Rules of Thoroughbred Racing 2004. They are confidential closed inquiries and the only public documents relating to stewards' inquiries are determinations which are published on the agency's website.¹
34. Should a matter proceed from a stewards' inquiry to an appeal, as was the case here, to the RPAT and a decision issued under the *Racing Penalties (Appeals) Act 1990*, decisions of the RPAT are publicly available on its website.
35. On 11 March 2016 the agency also provided the complainants with a copy of certain sections of the Stewards' Determination dated 15 May 2014.
36. Favours non-disclosure, I consider that there is a strong public interest in maintaining personal privacy, and that public interest may only be displaced by some other stronger and more persuasive public interest that requires the disclosure of personal information about one person to another person. The protection of an individual's privacy is a public interest which is recognised by, and enshrined in, the FOI Act by clause 3. The FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny in circumstances where there is no demonstrable benefit to the public interest in doing so.
37. In favour of disclosure, I recognise that there are public interests in applicants being able to exercise their rights of access under the FOI Act and in being able to access information that is held by a government agency. I accept that there is also a public interest in the transparency and accountability of government agencies.
38. In this case I consider that the public interest in the transparency and accountability of government agencies is served by the public availability of the RPAT decision and by the agency providing a copy of the relevant stewards' findings to the complainants.

¹ However my PLO conducted a search of the agency's website on 10 October 2016 and found that some determinations between 2011 and 2015 do not appear to be accessible.

39. In taking account of all of the information presently before me, I am not persuaded that the general right of access and the regime of openness and accountability inherent in the FOI Act requires the disclosure to the complainants of personal information about other individuals in this case.
40. Having weighed the competing public interests, I do not consider that those favouring disclosure outweigh the very strong public interest in the protection of the personal privacy of third parties in this instance. Accordingly, I consider that the limit on exemption in clause 3(6) does not apply.
41. My view is that the disputed document is exempt under clause 3(1) and none of the limits on exemption apply.
42. However I have also considered whether it is practicable to edit the disputed document to delete exempt personal information.

SECTION 24 – EDITING

43. Section 24 of the FOI Act applies to the deletion of exempt matter and provides as follows:

If –

- (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.

44. The application of section 24, and particularly the qualification contained in paragraph (b), was discussed by Scott J in *Police Force of Western Australia v Winterton* (1997) WASC 504 at page 16, as follows:

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, s.24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible.

45. I have also considered the agency's submission in its letter to me dated 31 August 2016 relating to editing the disputed document, previously referred to at paragraph [10] of this decision. I agree with the agency's submission and I have concluded that the personal information on every page of the disputed document is of such a significant quantity and is so intermingled with non-personal information that to delete the personal information would be impractical and would render the remainder of the document unintelligible to a reader.

DECISION

46. I find that the document is exempt under clause 3(1) and none of the limits on exemption apply. The agency's decision is varied.

APPENDIX

CLAUSE 3 OF SCHEDULE 1 TO THE FOI ACT

Personal information

- (1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).
- (2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.
- (3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to —
 - (a) the person; or
 - (b) the person's position or functions as an officer; or
 - (c) things done by the person in the course of performing functions as an officer.
- (4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to —
 - (a) the person; or
 - (b) the contract; or
 - (c) things done by the person in performing services under the contract.
- (5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.
- (6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

Glossary to the FOI Act clause 1

personal information means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead —

- (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or
- (b) who can be identified by reference to an identification number or other identifying particular.