

Decision D0192012 - Published in note form only

***Re Miller and Racing and Wagering Western Australia* [2012] WAICmr 19**

Date of Decision: 28 June 2012

Freedom of Information Act 1992: Sections 23(1)(b) and 26; Schedule 1: clause 7(1); Glossary: clause 4(1)

On 14 October 2010, the complainant, Mr Raymond Miller, applied under the *Freedom of Information Act 1992* ('the FOI Act') to Racing and Wagering Western Australia ('the agency') for access to certain documents relating to his disqualifications in October 1979 and April 1988 under the Australian Rules of Racing and to subsequent proceedings and investigations conducted by the agency and the former Western Australian Turf Club ('the WATC'), now known as Perth Racing.

The agency identified 62 documents as coming within the scope of the access application and gave the complainant access in full to 56 of those documents and refused access to six documents ('the disputed documents') on the ground that they were exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The complainant applied for internal review of the agency's decision and also stated that further WATC documents should exist that fell within the scope of the application. The agency confirmed its decision on internal review and advised that it held no additional documents and that the further requested documents were held by Perth Racing. The complainant applied to the Information Commissioner for external review of the agency's decision.

Following receipt of the complaint, the Commissioner obtained all relevant documents from the agency. On 13 April 2012, the Commissioner provided the parties with a letter setting out his preliminary view of the matter.

The Commissioner's preliminary view was that WATC documents held by Perth Racing were not documents in the possession or control of the agency. That is, they were not 'documents of an agency' as that term is defined in clause 4(1) of the Glossary to the FOI Act. Pursuant to s.23(1)(b) of the FOI Act, an agency may refuse access to a document if it is not a document of the agency. Clause 4(1) of the Glossary defines 'document of an agency' as a "reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access...". The Commissioner was satisfied that the additional WATC documents sought by the complainant were not in the agency's physical possession or under its control but, if they exist, would be held by Perth Racing, a private body: see *Channel 31 Community Educational Television Ltd v Inglis* [2001] WASCA 405 at [27] and [55].

With regard to the latter, the Commissioner noted a provision in the *Racing and Wagering Western Australia Act 2003* ('the RWWA Act') which gives the agency the power to direct a racing club (such as Perth Racing) to produce documents relating to the affairs of the racing club. However, without determining whether the additional WATC documents sought were documents which related to the affairs of the racing club, the Commissioner – following

Price and Nominal Defendant [1999] QICmr 3 at [27]; (1999) 5 QAR 80 at 91 and *Matthews and Department of Primary Industries and Fisheries* [2008] QICmr 30 at [26] – considered that the provision in the RWWA Act was a coercive statutory power to compel the production of documents for certain administrative or regulatory purposes. The Commissioner did not accept that it was the legislature’s intention that an agency should have to take some additional, formal step of exercising that power to take possession of documents in order to respond to an access application under the FOI Act. Accordingly, the Commissioner considered that the coercive power in the RWWA Act was not sufficient to bring the additional WATC documents sought by the complainant ‘under the control’ of the agency for the purposes of the FOI Act.

As there was nothing to indicate that the additional WATC documents sought by the complainant were in the possession or under the control of the agency, the Commissioner was of the preliminary view that they were not ‘documents of the agency’ and the agency was not required to deal with those documents as part of the access application.

Having reviewed the searches and inquiries undertaken by the agency, the Commissioner was satisfied that the agency had taken all reasonable steps to locate the requested documents held by the agency but that additional documents could not be found or did not exist. Consequently, the Commissioner’s preliminary view was that the agency was justified in refusing access to further documents pursuant to s.26 of the FOI Act.

With respect to the six disputed documents, the Commissioner’s preliminary view was that only a small amount of information in one of the documents was not exempt under clause 7(1). The Commissioner considered that the remainder of that document and the other five documents were privileged and, thus, exempt under clause 7(1), being confidential communications between the agency and its legal adviser made for the dominant purpose of seeking or giving legal advice or a record of those communications: see *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; and *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

The agency accepted the Commissioner’s preliminary view and gave the complainant access to the information in the one document that, in the Commissioner’s preliminary view, was not exempt under clause 7(1). The agency maintained its claim that the remaining information in that document and the other five documents (together ‘the disputed matter’) was exempt under clause 7(1). The complainant did not accept the Commissioner’s preliminary view and made further submissions to the Commissioner. In response to those submissions, the agency provided further information to the Commissioner.

The Commissioner considered the further submissions and reviewed all of the information before him but was not dissuaded from his preliminary view. The Commissioner found that WATC documents held by Perth Racing were not documents of the agency and confirmed the agency’s decision to refuse access to those documents under s.23(1)(b) of the FOI Act. The Commissioner also confirmed the agency’s decision to refuse access to further documents under s. 26 of the FOI Act and to refuse access to the disputed matter under clause 7(1).