

**CURRIE AND DOME**

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

**File Ref: 97045  
Decision Ref: D02597**

Participants:

**James Currie**  
Complainant  
  
- and -  
  
**Department of Minerals and Energy**  
**(Chemistry Centre Western Australia)**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents relating to tests conducted on blood and urine samples from trotting horse - section 26 - whether requested documents exist or should exist but cannot be found - ambit of access application.

*Freedom of Information Act 1992 (WA)* s. 26; Schedule 1 clauses 8(1), 11(1)(a), 11(1)(b).

## **DECISION**

The decision of the agency is varied. In substitution it is decided that access to the requested documents is refused because they do not exist.

**B.KEIGHLEY-GERARDY**  
**INFORMATION COMMISSIONER**

22nd September 1997

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Minerals and Energy ('the agency') to refuse Mr Currie ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 6 December 1996, the "Golden Nugget" horse race was held at Gloucester Park. In accordance with the usual practices of the Western Australian Trotting Association ('the WATA'), pre-race blood samples were taken from all runners in several races, including the Golden Nugget Final, and post-race blood and urine samples were taken from the winner in each race and from several placed horses. The samples were analysed by the Chemistry Centre of Western Australia ('the Chemistry Centre').
3. As a result of the testing performed by the Chemistry Centre, an anomaly was discovered in one of the samples. The WATA was notified and, after further inquiries by the stewards of the WATA, the prize money due to the winner of the Golden Nugget was withheld and a formal Stewards' Inquiry was initiated.
4. By letter dated 30 January 1997, solicitors for the complainant, the owner of the winning horse *True Takeoff*, lodged an access application with the Chemistry Centre seeking access under the FOI Act to documents described as:
  - “1. Any communications or contact by the agency or any officer or representative of the agency with the Western Australian Trotting Association in relation to the horse “*The Takeoff*” [sic] and the “*Golden Nugget*” race held on 6 December 1996.
  2. Any documents relating to the pre-race and/or after race swabs in relation to the horse “*True Takeoff*” and the “*Golden Nugget*” race held on 6 December 1996.
  3. Any documents or correspondence relating to the horse “*True Takeoff*”, its owner and trainer Mr James Currie, the horse's rider, and/or the “*Golden Nugget*” race held on 6 December 1996.”
5. The access application was dealt with by the agency as the department responsible for the Chemistry Centre. In its notice of decision dated 10 February 1997, the agency refused the complainant access to the requested documents, without confirming that it had them, on the basis that it could not identify the documents because the samples provided by the WATA are identified by coded number only and the names of the horses are not provided to the agency. The complainant was also informed that, in any event, the requested documents, if

they were able to be identified, would be exempt under clause 8(1) of Schedule 1 to the FOI Act.

6. The complainant applied for internal review of the agency's decision. In a notice of decision dated 24 February 1997, the internal reviewer varied the initial decision and granted the complainant access to two documents. However, without identifying the number or type of documents considered by the agency to be within the ambit of the complainant's access application, the agency refused access to any other documents on the ground that they are exempt under clauses 11(1)(a) and (b) of Schedule 1 to the FOI Act.
7. On 17 March 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### **REVIEW BY THE INFORMATION COMMISSIONER**

8. For the purpose of my dealing with this complaint, the agency produced to me a copy of its FOI file. I also obtained from the Chemistry Centre a number of documents which are said to be the results of tests for various compounds conducted on samples received by the Chemistry Centre between 5 December 1996 and 17 December 1996.
9. In the application to my office for external review, the complainant claimed, among other things, that other documents which are within the scope of the access application should exist in the agency and should, therefore, be made available to him. In particular, the complainant informed me that he sought access to documents including:
  - (i) instructions from the WATA to the Chemistry Centre;
  - (ii) data supporting the findings of the Chemistry Centre in relation to a report dated 4 February 1997;
  - (iii) all non-positive test results;
  - (iv) correspondence between the WATA and the Chemistry Centre; and
  - (v) the files of Jean Ralston and Charles Russo in relation to this matter.
10. My office made inquiries with the agency and the Chemistry Centre concerning testing procedures. I also received copies of certain documents leading up to the Stewards' Inquiry, which documents post-dated the complainant's access application.
11. After considering the material before me, on 12 June 1997, I informed the parties in writing of my preliminary view of this complaint, together with my reasons. It was my preliminary view that the documents initially requested by the complainant could not be found. I also informed the complainant of the results of my investigation to locate the kind of documents identified in the complaint to my office. That investigation had failed to locate any documents of the kind described by the complainant.

12. Subsequently, the complainant provided my office with copies of relevant extracts from the transcript of evidence given during the Stewards' Inquiry. The complainant submitted that the extracts of evidence indicate that various tests were undertaken on samples of urine from *True Takeoff* and, accordingly, the complainant was of the view that documents containing the results of those tests should exist in the agency. However, by letter dated 28 July 1997, solicitors for the complainant confirmed my understanding that the complainant did not seek access to documents that had been created after the date of the access application.

### **REFUSAL OF ACCESS - SECTION 26 OF THE FOI ACT**

13. Section 26 of the FOI Act deals with the requirements on an agency in circumstances in which it is unable to locate the document sought by an access applicant. Pursuant to s.26 of the FOI Act, access may be refused on the ground that a document either does not exist or cannot be found. Section 26 provides:

***“Documents that cannot be found or do not exist***

26. (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -*

*(a) all reasonable steps have been taken to find the document;  
and*

*(b) the agency is satisfied that the document -*

*(i) is in the agency's possession but cannot be found;*

*or*

*(ii) does not exist.*

*(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document”.*

14. I have previously expressed the view that, when dealing with a complaint concerning a decision of an agency to refuse access on the ground that documents either do not exist or cannot be found, there are two questions that must be answered. The first of those is whether there are reasonable grounds to believe that those documents exist or should exist, and are, or should be, held by an agency. In the circumstances in which the first question is answered in the affirmative, the second question, in my view, is whether the agency has taken all reasonable steps to find the documents.

**Do the documents exist or should they exist?**

15. The Chemistry Centre provides a service to the WATA for the conduct of independent tests on samples taken from horses and other animals competing in races in this State. I am informed by the Chemistry Centre that the current procedures for the receipt and analysis of samples received from the WATA begin with the receipt of samples by the Chemistry Centre's Racing Chemistry Laboratory (RCL) in metal cans which are locked with a padlock and sealed with a numbered seal. Each metal can contains the samples for initial testing and the Analyst Copy of the WATA card loose in the can. A sealed plastic bag containing the control samples and the Control Copy of the WATA card is also in the can. The Analyst Copy of the WATA card indicates the card number, the date, the sex and age of the animal, the type of samples included and whether the sample relates to a winning horse or an unplaced horse, but it does not identify the particular horse.
16. The WATA card consists of three detachable sections. The Analyst Copy section, the Control Copy section and a third section which is retained by the WATA. Only the Analyst Copy and the Control Copy sections are sent to the RCL with the samples. The Analyst Copy and Control Copy of the WATA card have the same identification number ('the card number') and the card number is identified on all the samples in the metal can. However, only the WATA is able to identify the particular samples in a particular metal can and to determine the identity of the animal involved by correlating the Analyst Copy of the WATA card with the section of the card retained by it. The RCL does not correlate the seal number on the metal can with the card number of the samples received and, therefore, cannot at that stage of the process, correlate the identity of a particular animal with a particular sample.
17. I am informed that, once the samples have been received by the RCL, they are recorded in a sample receipt book by their seal number and date of receipt. Each sample ("sample" refers to the entire contents of each metal can) is logged onto a computer using its card number and a unique laboratory number which is assigned to the sample by the RCL. Labels are then generated and printed for each sample. At this point, the RCL is able to identify each sample according to the laboratory number assigned to it. The sample can also be identified by its card number.
18. I am further informed that batches of samples for a week or two weeks, as the case may be, are tested by the Chemistry Centre at any one time. The samples are run in batches through various tests. The tests vary and in part are related to the information provided on the Analyst Copy of the WATA card included with the samples in the metal can.
19. Test worksheets are generated for batches of samples and the results of the tests indicated on the worksheet, including any anomalies detected. If an anomaly is identified in a batch of results, then further tests are conducted on the sample with the anomaly to determine if a drug is present. If a drug is confirmed in the

sample, a report on the drug detected is then provided to the WATA. A second report is issued to the WATA upon analysis of the control samples.

20. I am also informed that the WATA does not generally issue any written instructions to the RCL with respect to the conduct of any particular test on any particular sample. However, if there are rumours in the racing industry that a particular drug is being used by participants, then the RCL may be asked if its tests will detect the suspected substance. Further, if an animal exhibits odd behaviour, then the WATA may ask the RCL whether it is testing for drugs which could produce that particular type of behaviour. Instructions of that nature are currently given verbally and not in writing.
21. It is clear to me that the RCL may only make a correlation between a sample and a particular animal if additional information is supplied to the RCL at the discretion of the WATA. It is my understanding that, at the time the agency was dealing with the complainant's access application, no such information had been supplied to the RCL by the WATA.
22. I have examined the documents produced to me which contain the results of the testing done by the Chemistry Centre during the period 5/12/96 - 17/12/96. That period covers the date of the Golden Nugget race and I understand that the batch of samples tested during that period is the only batch that was tested by the Chemistry Centre up to, and including, the date of the complainant's access application. Having inspected those documents, it appears to me that none of the documents produced to me by the Chemistry Centre specifically identifies the horse *True Takeoff*, nor can any of those documents be identified as specifically relating to the Golden Nugget race. Some of the documents may well relate to that race, but the agency is unable to identify which of them.
23. I have no doubt that the results of the tests of the samples taken from *True Takeoff* are recorded somewhere in the documents produced to me. However, I am unable to identify the precise documents involved, and I accept that the agency cannot do so either. There is simply no way that I can identify any of the test results as being specific to the Golden Nugget race or to *True Takeoff*. The documents comprise a set of computer-generated figures which relate to certain chemical compounds and other graphs recording the presence of various compounds. There is nothing in any of those documents which enables me to say that a particular document relates to *True Takeoff* or to the Golden Nugget race.
24. In respect of the documents described in points 1 and 3 of the complainant's access application set out in paragraph 4 above, I am informed by the Chemistry Centre that no written communications were received from the WATA concerning *True Takeoff*, the Golden Nugget race, or the complainant. The only documents which the agency holds are the computerised test results and the RCL log of samples received during the relevant period. None of the information in those documents can be matched to the horse *True Takeoff* or to the Golden Nugget race.

25. Further, in respect of the files of Jean Ralston and Charles Russo requested by the complainants, I am informed that no files are held by Ms Ralston or Mr Russo in relation to this matter. It has been confirmed by my office that individual officers within the Chemistry Centre do not create individual files with respect to results of tests that the officer may carry out. All documents generated within the Chemistry Centre as a result of tests carried out are filed on a single file relating to the batch of samples being tested by the Chemistry Centre. If a test results in an anomaly being identified the documents generated as a result of those tests are filed on files containing positive test results.
26. Therefore, for the reasons given above, I am satisfied that the documents requested by the complainant did not exist in the agency at the time the agency made its initial decision, in so far as there were no documents that could be matched to the Golden Nugget race and to the horse *True Takeoff* and which are within the ambit of the complainant's access application.
27. I understand that the agency does have in its possession a number of documents which specifically relate to the Golden Nugget race and to subsequent testing on the horse *True Takeoff*. However, those documents post-date the complainant's access application and, in a letter to me on 28 July 1997, the solicitors for the complainant confirmed that they do not seek access to any documents created after the date of the access application. Accordingly, I do not consider that those documents are within the scope of the request.
28. For the reasons given, access is refused because effectively the requested documents - that is, documents that can be identified as relating to the Golden Nugget Race on the relevant date and the horse *True Takeoff* - do not exist. Alternatively, documents relating to that race and documents relating to that horse cannot be found because they cannot be identified. On either basis, I find that the agency's decision to refuse access was justified.

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