

## Determination

### External review - section 39 *Freedom of Information Act 1991*

<b>Applicant</b>	The Hon Michelle Lensink MLC
<b>Agency</b>	Minister for Racing
<b>Ombudsman reference</b>	2016/02201
<b>Agency reference</b>	15MRAC/FOI040
<b>Provisional determination</b>	The determination of the agency reversed.

## REASONS

### Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency to:

...all emails, reports, memorandums, contracts, discussion papers and all other documents between the Minister and/or Minister's office and Greyhound Racing South Australia (**GRSA**) from October 2014 to the present day.

### Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

### Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

### Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 6 October 2016. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. The agency and the interested party, GRSA, provided submissions in response. I have considered these submissions in this determination

### Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>

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<sup>1</sup> *Freedom of Information Act 1991*, section 12.

7. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access. Clauses 6(1) and 7(1)(c) are relevant to my external review, which I have set out in full below:

#### 6—Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
  - (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
  - (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.
- (3a) A document is an exempt document if it contains matter—
- (a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and
  - (b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

#### 7—Documents affecting business affairs

- (1) A document is an exempt document—
  - (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
  - (b) if it contains matter—
    - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
    - (ii) the disclosure of which—
      - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
      - (B) would, on balance, be contrary to the public interest; or
  - (c) if it contains matter—
    - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
    - (ii) the disclosure of which—
      - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
      - (B) would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is made.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.

8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

#### Documents in issue

10. The agency identified twenty three documents within the scope of the application.
11. The following documents within the scope of the application were provided to the applicant:
  - Document 1: Application for Access to Documents - dated 16 October 2015
  - Document 2: Acknowledgement letter to Ms Lensink - dated 22 October 2015
12. The following documents within the scope of the application were not provided to the applicant:
  - Document 3: Consultation letter to Mr Corby - Greyhound Racing SA - dated 3 November 2015 (including all correspondence identified in scope)
  - Document 3A: Letter from Minister for Racing and Minister for Sustainability and Environment dated 13 October 2015
  - Document 3C: email chain from Greyhound Racing SA titled Conduct of the RSPCA - COMMERCIAL in CONFIDENCE dated 17 September 2015, attaching letter from Greyhound Racing SA dated 16 September 2015
  - Document 3D: Letter from Greyhound Racing SA dated 13 May 2015
  - Document 4: Response from Mr Corby - dated 13 November 2015
  - Document 5: Correspondence from Michelle Lensink's Office dated 10 December 2015
  - Document 6: Letter to Hon Michelle Lensink's Office dated 30 December
  - Document 7: Additional consultation letter to Mr Corby - Greyhound Racing SA - dated 30 December 2015 (including additional correspondence identified in scope)
  - Document 7A: Email from Greyhound Racing SA dated 2 July 2015 attaching letters from Greyhound Racing SA dated 3 July 2015
  - Document 7B: Letter from Minister for Racing dated 5 August 2015
  - Document 7C: Email chain from Greyhound Racing dated 15 May 2015, attaching copy of previous correspondence dated 13 May 2015
  - Document 7D: Email from Office of the Minister for Racing dated 20 March 2015
  - Document 7E: Email from Greyhound Racing SA dated 19 March 2015
  - Document 7F: Email chain from Greyhound Racing SA dated 3 February 2015
  - Document 8: Response from Greyhound Racing SA - dated 8 January 2016
  - Document 9: Determination letter to Ms Lensink - dated 20 January 2016
  - Document 9A: Acknowledgement Letter from Office of Minister for Racing dated 15 May 2015
  - Document 9B: Acknowledgement Letter from Office of Minister for Racing dated 17 September 2015
  - Document 10: Application for internal review Ms Lensink dated 5 February 2016
  - Document 11: Response letter to Ms Lensink dated 18 February 2016

#### Issues in this review

13. The issue for me to consider in this review is whether the agency has justified its determination to not release documents 3 - 11.

## Consideration

### *The agency*

14. In its notice of determination dated 20 January 2016, the agency advised that it considered the documents were exempt under clause 7(1)(c) under the FOI Act, and determined to refuse the release of documents 3 - 11.
15. Regarding clause 7(1)(c) the agency submitted the following reasons as to why it considered the documents are exempt under the FOI Act:

The documents contain information about Greyhound Racing South Australia's internal policies, procedures, financial statements and regulatory framework.

It is vital for the Office [of the Minister for Racing] to be able to deal openly but still ensure information can remain in confidence this ensures productive relationships with organisations and the community.

Releasing the documents you could reasonably expect there to be an adverse effect on those affairs and or prejudice the further supply of such information to Government and or an agency and on the balance be contrary to the public interest.

### *Greyhound Racing South Australia*

16. In a letter dated 13 November 2015 to the FOI Policy Officer, GRSA also submitted the following reasons in support of refusing to release the documents:

The requested documents contain information about GRSA's internal policies, procedures and regulatory framework (and proposed amendments to same, information about GRSA's financial circumstances, and about its relationship with the RSPCA and the Office.

Additionally, the document [Letter from Mr Corby to Minister Bignell dated 13 May 2015] includes information about GRSA's relationship with the University of Adelaide, and the subject of which is particularly sensitive to the University.

17. In light of the submissions in relation to GRSA's relationship with the Royal Society for the Prevention of Cruelty to Animals (**the RSPCA**) and the University of Adelaide, I will consider whether the documents may additionally be exempt under clause 6(1) under the FOI Act.

### *Clause 7(1)(c)*

18. The agency did not point me to specific documents, or sections within the documents, to which it claimed exemption under clause 7(1)(c). Therefore, I have considered whether the exemption applies to the documents in their entirety. The FOI Act states that on receipt of an access application, if an agency makes a determination to refuse access to the requested documents, it must give reasons in its notice of determination.<sup>2</sup> Agencies must link the exemptions claimed to the actual contents of the documents, rather than make 'blanket' claims over the documents. This issue was discussed in the Ombudsman's recent FOI audit.<sup>3</sup>
19. For a document to be exempt pursuant to clause 7(1)(c), three criteria must be satisfied:

<sup>2</sup> *Freedom of Information Act 1991*, section 23(2)(f).

<sup>3</sup> See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7A, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

- the document must contain matter (other than trade secrets or information of commercial value) concerning the business, professional, commercial or financial affairs of the agency or any other person; and
- the disclosure of that matter could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
- disclosure of that matter would, on balance, be contrary to public interest.

*Does the document consist of information concerning the business, professional, commercial or financial affairs of any agency or any other person? (clause 7(1)(c)(i))*

- GRSA is currently registered with the Australian Securities & Investments Commission (ASIC) as an Australian Public Company, Limited By Guarantee.<sup>4</sup> Under the *Acts Interpretation Act 1915 (the Interpretation Act)*, a 'person' includes a body corporate.<sup>5</sup> I am satisfied that under the *Corporations Act 2001 (Cth) (the Corporations Act)*, GRSA is a body corporate and may be considered a person for the purpose of this clause.<sup>6</sup>
- Business affairs are those relating to the conduct of a business; 'business' being an operation carried on in an organised way with the purpose of obtaining profits or gains, whether or not they are actually obtained.<sup>7</sup>
- I have considered each document and the majority of documents contain information relating to ethical issues, internal policies and procedures, public criticism of the racing industry and media releases.
- In my provisional determination, I stated that I did not consider that these documents fell within clause 7(1)(c)(i) as they do not consist of information concerning the business, professional, commercial or financial affairs of the agency or GRSA. The agency also identified a number of documents that were not in scope, including the applicant's FOI applications and the agency's responses to those applications, which I have categorised as documents that do not contain information relating to the business affairs of the agency or GRSA.
- However, I consider that the following documents do contain information that is relevant to clause 7(1)(c)(i), as they contain information that relates to the recruitment of employees, the financial affairs of GRSA, and various other matters. These documents include:
  - Document 3D: Letter from Greyhound Racing SA dated 13 May 2015
  - Document 7A: Email from Greyhound Racing SA dated 2 July 2015 attaching letters from Greyhound Racing SA dated 3 July 2015
  - Document 7E: Email from Greyhound Racing SA dated 19 March 2015
  - Document 7F: Email chain from Greyhound Racing dated 3 February 2015
- In response to my provisional determination, GRSA made the following submission:

<sup>4</sup> As registered on 6 October 2016, *ASIC Connect*, <[https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?\\_adf.ctrl-state=1d3k1sbvch\\_4](https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?_adf.ctrl-state=1d3k1sbvch_4)>.

<sup>5</sup> *Acts Interpretation Act 1915*, section 4.

<sup>6</sup> *Corporations Act 2001 (Cth)*, section 9.

<sup>7</sup> *Re Stewart and Department of Transport* (1993) 1 QAR 227; *Re Cannon and Australian Quality Egg Farms Ltd* (1984) 1 QAR 491.

GRSA's position in relation to the balance of the challenged documents (documents 3A, 3C and 7C), however, is that they too concern the business, professional and commercial or financial affairs of GRSA within the meaning of clause 7(1)(c)(i).

These documents contain information regarding GRSA's operations and dealings in relation to managing the conduct of greyhound racing, providing industry control and direction, and encouraging and enhancing the welfare of greyhounds. For example, documents 3A and 7C outlines private negotiations and dealings between GRSA and the RSPCA. Document 3A also outlines expansions of GRSA's rehoming programme and amending GRSA's Code of Conduct. In addition, Document 3C (also marked commercial in confidence) refers to the true nature of the funding of an industry funded project.

GRSA submits that these matters fall squarely within GRSA's core operations noted above, which ultimately relate the conduct of GRSA's business as the controlling body for greyhound racing in South Australia.

26. I have reconsidered those documents, which I list below:

- Document 3A: Letter from Minister for Racing dated 1 June 2015
- Document 3C: Email chain from Greyhound Racing SA titled Conduct of the RSPCA - COMMERCIAL in CONFIDENCE dated 17 September 2015, attaching letter from Greyhound Racing SA dated 16 September 2015
- Document 7C: Email chain from Greyhound Racing SA dated 15 May 2015, attaching copy of previous correspondence dated 13 May 2015

27. I do not accept GRSA's submissions that these documents contain information concerning business affairs as defined in paragraph 21. I have turned my mind to whether even a broad interpretation of this information could meet this definition, and am not persuaded of this reading of the information.

28. However, I have erred on the side of caution and accepted a liberal interpretation as to whether document 3C, which makes reference to the clarification of a press release by the RSPCA, could be seen as information relating to GRSA's business affairs.

*Could it reasonably be expected that disclosure of the documents would have an adverse effect on those affairs? (clause 7(1)(c)(ii)(A))*

29. For there to be a reasonable expectation that an adverse effect could result from disclosure, there must be real or substantial grounds for the expectation, rather than grounds which are speculative, imaginable or theoretically possible.<sup>8</sup> It is sufficient if the adverse effect is slight and if it is produced by the document in connection with other information.<sup>9</sup>

30. In regard to documents 3C, 3D, 7A, 7E, 7F, I have turned my mind to the possibility of whether releasing these documents could have an adverse effect on GRSA.

31. The agency originally submitted that releasing these documents could have an adverse effect on its relationship with GRSA as it would affect the flow of information from GRSA to the agency. However, as the documents relate to the business affairs of GRSA, I did not consider any potential adverse effects on the agency relevant to satisfying the requirements of clause 7(1)(c)(ii)(A).

<sup>8</sup> *Attorney-General's Department v Cockcroft (1986)* 10 FCR 180; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health (1992)* 108 ALR 163.

<sup>9</sup> *Ipex Tech v Department of Information Technology Services (1997)* SA District Court 3618 (16 June 1997) Lunn J.

32. As the agency did not provide submissions as to how the release of the documents would have an adverse effect on GRSA, I turned my mind to the potential ways in which

the disclosure could have an adverse effect on GRSA in my provisional determination and was not satisfied there was a risk of substantial adverse effect on GRSA on grounds which are more than speculative, imaginable or theoretical.

33. In response to this finding, GRSA made the following submissions:

With respect, it appears that the Ombudsman in the provisional determination has failed to consider this alternative criteria provided in clause 7(c)(ii)(A) in relation to documents 3D, 7A, 7E and 7F, and specifically whether the disclosure of these documents will prejudice the supply of information by GRSA.

In relation to the challenged documents generally, GRSA's submission is that the disclosure of these documents will in fact prejudice the future supply of information from GRSA to the Government.

As it stands, GRSA engages in frank and open correspondence with the Minister for Racing on a voluntary basis with a view to productive collaboration and consultation with the Government. GRSA is of the view that this facilitates a robust and frank consideration of public and Government concern regarding the greyhound racing industry. GRSA provides such information on an understanding of confidentiality and takes comfort in the knowledge that their communications will not be selectively quoted or taken out of context by those interests which might not be consistent with those of the greyhound industry. If the challenged documents are released, GRSA would be more circumspect

34. As stated in my provisional determination, I do not accept the submission that the disclosure of these documents is likely to impede the flow of information between the government and external organisations and the community. The mere expectation that material should not be disclosed through the FOI process out of concern it may prevent future communications could be applied to all FOI requests, which would defeat the entire purpose of the FOI Act. Therefore, these reasons are rejected.
35. Further, much of the information contained within the documents is both non-controversial or already publicly available; for example, media releases and references to a television program that has been broadcasted.

*Would the disclosure of the document, on balance, be contrary to the public interest? (clause 7(1)(c)(ii)(B))*

36. Although I am not satisfied the disclosure of these documents would have an adverse effect on the affairs of the agency or GRSA, for the sake of completeness I will consider whether disclosure would be contrary to public interest.
37. Where an adverse effect under clause 7(1)(c)(ii)(A) is made out, the applicant must also prove disclosure is contrary to the public interest. Whilst the adverse effect is a public interest factor supporting non-disclosure, in isolation it is not generally enough to form a basis for a finding that disclosure would be contrary to the public interest.
38. The information in the documents within the scope of this FOI application concerns the relationship between the agency and GRSA. This includes discussions about the financial relationship between GRSA and the South Australian Government. I consider that disclosure could reasonably be expected to promote open discussion of public affairs, enhance the government's accountability and ensure effective oversight of expenditure of public funds.

39. As previously stated in paragraph 34, I do not accept the GRSA and the agency's submission that the disclosure of these documents is likely to impede upon the flow of information between the government and external organisations and the community.
40. The agency also made submissions that disclosure was not in the public interest due to tensions in the relationship between GRSA and the RSPCA. Whilst I accept that some of the material in the documents may not be well received by the RSPCA, I note that copies of these documents have already been provided to the RSPCA for comment. Therefore, I do not consider that releasing these documents to the applicant would have any further consequences for the relationship between GRSA and the RSPCA.
41. Even if the release of the documents were likely to effect the relationship between GRSA and the RSPCA, I am not persuaded that the preservation of this relationship is of relevance to the public interest. Whilst any potential adverse effects to the relationship may be relevant to the interests of GRSA and the RSPCA, I do not consider this of relevance to the broader public interest.
42. I am of the opinion that the information within these documents is important to the ongoing discussions in regard to greyhound racing, and I am unconvinced by submissions made by both the agency and GRSA as to why disclosure would be contrary to public interest. Much of the information relates to the implementation of ethical policy and procedural reforms within GRSA in response to public concerns about animal welfare in the racing industry, and I am persuaded they should be released to the applicant.
43. I do not consider that disclosure of the documents is on balance contrary to the public interest.

*Clause 6(1)*

44. GRSA raised concerns about the documents relating to its relationship with the RSPCA and the University of Adelaide, and the potential that these documents may contain sensitive information relating to these third parties. Therefore, I have considered whether the documents may be exempt under clause 6(1) of the FOI Act.
45. Under clause 6(1), 'A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person.' The FOI Act also states that personal affairs do not include the personal affairs of a body corporate.<sup>10</sup>
46. As the RSPCA (South Australia) Incorporated is a body corporate under the Corporations Act, and the University of Adelaide is a body corporate established pursuant to the provisions of the *University of Adelaide Act 1971*, I am not satisfied that exemption under clause 6(1) applies.<sup>11</sup>
47. My legal officer has also contacted representatives from both the RSPCA and the University of Adelaide, who did not oppose the release of the documents to the applicant.

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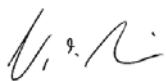
<sup>10</sup> *Freedom of Information Act 1991*, section 4.

<sup>11</sup> *Corporations Act 2001* (Cth), section 9; *University of Adelaide Act 1971*, section 4(3).



**Determination**

48. In light of my views above, I reverse the agency's determination.



Wayne Lines  
**SA OMBUDSMAN**

31 October 2016

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## APPENDIX

### Procedural steps

Date	Event
19/10/2015	The agency received the FOI application dated 16 October 2015.
20/01/2016	The agency determined the application.
10/02/2016	The agency received the internal review application dated 5 February 2016.
18/02/2016	The agency confirmed the determination.
09/03/2016	The Ombudsman received the applicant's request for external review dated 4 March 2016.
16/03/2016	The Ombudsman advised the agency of the external review and requested submissions and documentation.
05/04/2016	The agency provided the Ombudsman with its submissions and documentation.
6/10/2016	The Ombudsman made a provisional determination.
26/10/2016	GRSA provided further submissions in response to the provisional determination.
27/10/2016	The agency provided further submissions in response to the provisional determination.

