Gresham and the Queensland Principal Club

(S 26/01, 13 August 2001, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. The applicant is a member of the Gold Coast Turf Club (GCTC) who has concerns regarding expenses incurred by committee members of the GCTC for travel and entertainment during the 1998/99 financial year. In September 2000, he took his concerns to the Queensland Principal Club (the QPC), the body established by Part 3 of the *Racing and Betting Act 1980* Qld to control, supervise and regulate horse racing in Queensland.

4. The QPC investigated the complaint and, by letter dated 16 October 2000, informed the applicant of the outcome of its investigation and that it did not intend to take the matter further. The applicant was not satisfied with that response and, by letter dated 27 November 2000, sought access under the FOI Act to two internal memoranda of the QPC concerning the investigation of his complaint.

5. By letter dated 8 January 2001, Mr M Pearson on behalf of the QPC informed the applicant of his decision that the documents were exempt from disclosure to him under s.41(1) of the FOI Act. The applicant sought internal review of that decision by letter dated 15 January 2001, but received no decision within the prescribed time. By letter dated 31 January 2001, the applicant sought review by the Information Commissioner, under Part 5 of the FOI Act, of the QPC's deemed decision on internal review confirming Mr Pearson's refusal of access to the memoranda: see s.52(6) of the FOI Act.

External review process

6. The documents in issue were provided to me by the QPC. They comprise two memoranda dated 27 September 2000 and 16 October 2000 from Mr J Turner, Finance Director, QPC to Mr K Hasemann, Chief Executive Officer, QPC. By letter dated 2 March 2001, the Assistant Information Commissioner informed the QPC of his preliminary view that the memoranda did not qualify for exemption under s.41(1) of the FOI Act. The QPC lodged a submission in reply, dated 17

April 2001, contesting the preliminary views expressed by the Assistant Information Commissioner.

7. The GCTC was informed of the external review and granted status as a participant in accordance with s.78 of the FOI Act. The relevant parts of the submission of the QPC were provided to the GCTC and the applicant. At the same time, both the GCTC and the QPC were provided with copies of the applicant's external review application and attachments, and invited to lodge any submissions or evidence they wished to put forward in support of their cases. The QPC lodged an additional submission dated 19 June 2001 and the GCTC lodged a submission dated 25 June 2001.

8. In making this decision I have taken into account the following:

1. the contents of the documents in issue;
2. initial FOI access application dated 27 November 2000;
3. initial decision dated 8 January 2001;
4. application for internal review dated 15 January 2001;
5. application for external review dated 31 January 2001, with attachments;
6. submissions from the QPC dated 17 April 2001 and 19 June 2001;
7. submissions from the GCTC dated 25 June 2001.

Jurisdictional issue

9. The GCTC contended that:

> *The right to access documents under the Act only applies in relation to governmental type agencies; it does not operate against private individuals or corporations. … Although the* [QPC] *is a public authority, the documents solely regard the affairs of the* [GCTC]*, a private entity, being an unincorporated Association comprising all members for the timebeing of the Club.*
> …
> *The memorandums in question concern private Club matters. We submit that if you were to disclose the documents, you would be disclosing information wholly regarding the inner operations of a private club (which are private matters of members), and not the information of a governmental agency to which the Act necessarily applies.*

10. If this submission is a claim that documents containing information about a private sector organisation are not subject to the application of the FOI Act, it is clearly wrong. Section 21 of the FOI Act provides that a person has a legally enforceable right to be given access in accordance with the Act to documents of an agency. The term "document of an agency" is defined in s.7 of the FOI Act to mean a document in the possession, or under the control, of an agency, whether created or received in the agency. This definition extends to documents in the possession of an

agency and those to which the agency is entitled to access: see *Re Price and Nominal Defendant* (1999) 5 QAR 80 at p.89, paragraph 18.

11. In fact, many documents held by agencies (and probably most documents, in the case of regulatory agencies) refer to, or deal with, issues concerning private individuals or organisations. Parliament has recognised the interests of those individuals and organisations, not by excluding from the application of the FOI Act documents which refer or relate to them, but by including exemption provisions which can take those private interests into account in appropriate circumstances: see s.5, and for example, sections 44(1) and 45(1) of the FOI Act. The documents in issue were created by an officer of an agency for the use of officers of that agency. They are clearly documents of the agency for the purposes of the FOI Act.

<u>Application of s.41(1) of the FOI Act</u>

12. Sections 41(1) and (2) of the FOI Act provide:

> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it merely consists of —*
>
> *(a) matter that appears in an agency's policy document; or*
>
> *(b) factual or statistical matter; or*
>
> *(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.*

13. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*

> (a) *would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> (b) *would disclosure, on balance, be contrary to the public interest?*
>
> 22. *The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

14. An applicant for access is not required to show that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can show that disclosure of the particular deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, I said (at paragraph 34):

> *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1)(a) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

15. The Assistant Information Commissioner expressed the preliminary view to both the QPC and the GCTC that the bulk of each of the documents in issue was merely factual matter. It largely records the inquiries made by Mr Turner for the purposes of his investigation and the results of those inquiries. The submissions of the QPC and the GCTC have done nothing to persuade me to the contrary. Nevertheless, given my finding below with regard to the public interest balancing test, I do not consider it necessary to identify which particular matter in each document does or does not meet the requirements of s.41(1)(a). I will consider the application of the public interest balancing test to all of the matter in issue.

Public interest considerations favouring non-disclosure

16. The QPC and GCTC identified a number of considerations that they contended weighed against disclosure of the documents in issue. In summary, they are:

1. adverse effects on the ability of the QPC to carry out its functions because:

    1. clubs would be less likely to co-operate with the QPC in providing information to it in the future; and
    2. QPC officers who prepared reports would be less likely to provide full and frank reports if they were aware that information of this type might be disclosed;

1. adverse effects on the GCTC because:

    1. the comments in the memoranda were preliminary only and the GCTC had not been given the opportunity to respond to critical comments in the memoranda;
    2. the GCTC is a private organisation whose dealings should not be disclosed under the FOI Act;
    3. the GCTC is a commercial operation and disclosure might have a negative effect on its commercial interests, including its ability to attract sponsors;

1. an adverse effect on individuals who were criticised in the memoranda who had not had an opportunity to respond to it.

Effect on the ability of the QPC to carry out its functions

17. The QPC argued that it operates in a complex context, having to deal with clubs that are primarily governed by general laws relating to unincorporated or incorporated bodies. It contended that this gives rise to a significant risk of legal disputation in the administration of the *Racing and Betting Act*. It contended that this means that it is required to operate in a co-operative fashion with race clubs in order to minimise the potential for litigation. It stressed the importance of full and open co-operation from clubs in relation to communication with the QPC. It said that it wished to avoid a situation where requests for information would be narrowly considered on the basis of what was legally required.

18. In that regard, I am not satisfied that the QPC is in any different position from any other regulatory or supervisory body which seeks or requires information from the individuals or organisations that it regulates. The functions and powers of the QPC are set out in the *Racing and Betting Act*, and there is nothing before me to show that those powers are diminished by anything in the general law or legislation relating to the constitution of clubs. Particularly with regard to financial matters, the QPC has the power and obligation to examine the financial statements given by a club and to "make such inquiry into and take such action with regard to the statements, or an item or matter contained in or arising out of the statements" as it thinks fit: s.131 of the *Racing and Betting Act*. In addition to the legislative power, clubs must be aware that it is the role of the QPC to control, supervise and regulate horse racing and that the QPC has the ultimate power with respect to the registration of race clubs. There is therefore a

significant incentive for clubs to co-operate fully with the QPC with regard to any complaint, in order to demonstrate that there is no basis why their registration should be called into question.

19. The submissions of the QPC and the GCTC have suggested that the information in issue is particularly sensitive. However, I am not satisfied that that is the case. The bulk of the memoranda simply record the course of Mr Turner's investigation. There are some suggestions for improvements in accounting and management controls, but these are relatively minor. Moreover, both the course of the investigation and the general nature of the recommendations for improvement have already been made known to the applicant in letters from the Chief Executive Officer of the QPC dated 13 October and 16 October 2000. For example, Mr Hasemann stated:

> *The discussion between Mr Turner and Mr Steer, and the assessment of the Assistant Auditor General, has confirmed that some tightening of accounting and management controls at the Gold Coast Turf Club, in respect of individual Committee member expenses and use of corporate credit cards, is warranted. In that regard a number of recommendations have been made to the club, several of which, I understand, have already been adopted.* [letter dated 13 October 2000]
>
> ...
>
> *The club has now provided me with a comprehensive response to recommendations made on the implementation of tighter controls and policies governing Committee member expenses, and to queries regarding the nature and purpose of individual transactions in 1998/99.*
>
> *In relation to expenses incurred during the 1998/99 year, I am satisfied, following consideration of the information provided by the club, that there are no grounds for a reasonable suspicion of activities by officials in breach of Section 134 of the* Racing and Betting Act. *I am also satisfied that the Committee has now taken the necessary decisions to improve accountabilities and controls in relation to these expenses.* [letter dated 16 October 2000]

20. Taking into account the nature of the matter that is in the documents in issue, the extent of disclosure which has already been made to the applicant, the legislative powers of the QPC, and the advantage to clubs in co-operating with the QPC, I am satisfied that disclosure of the documents in issue could not be expected to lead to any significant reduction in the level of co-operation by Clubs with the QPC in the future. I therefore do not give significant weight to this claimed public interest consideration.

21. Likewise, I do not consider that disclosure of the documents in issue could be expected to cause Mr Turner, or other officers of the QPC in a similar position, to refrain from

carrying out their duties by failing to fully inform senior officers of the QPC about matters which they are investigating. At pp.106-107 (paragraphs 132-134) of *Re Eccleston*, I said:

> *132 I consider that the approach which should be adopted in Queensland to claims for exemption under s.41 based on the third* Howard *criterion (i.e. that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind) should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second* Fewster *case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.*
>
> *133 I respectfully agree with the opinion expressed by Mason J in* Sankey v Whitlam *that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.*
>
> *134 Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.*

22. There is no evidence before me which establishes, and my consideration of the contents of the documents in issue does not in my view support, a finding that disclosure of the documents in issue would inhibit candour and frankness in future similar communications to an extent that would be contrary to the public interest in the efficient and effective performance of the QPC's functions.

<u>Adverse effects on the GCTC</u>

23. It is contended that the memoranda were not final reports, and that they contained comments critical of the GCTC to which it had no opportunity to respond. In that regard, the QPC referred to the decision of the Commonwealth Administrative Appeals Tribunal in *Re Howard and the Treasurer of the Commonwealth* (1985) 7 ALD 626. Along similar lines, the GCTC contended that in *Re Eccleston*, I agreed that disclosure of interim reports containing criticism of particular people without their response, and before completion of a final report, was unfair and contrary to the public interest. My views on such claims were stated in paragraph 96 of *Re Pope and Queensland Health* (1994) 1 QAR 616:

> *96. It is possible to envisage circumstances in which the public interest in fair treatment of individuals might be a consideration favouring non-disclosure of matter comprising allegations of improper conduct against an individual where the allegations are clearly unfounded and damaging, and indeed might even tell against the premature disclosure of matter comprising allegations of improper conduct against an individual which appear to have some reasonable basis, but which are still to be investigated and tested by a proper authority. In this case, however, I am dealing with a report into allegations of improper conduct against an individual, the report having been made by an independent investigator who has allowed the subject of the allegations a reasonable opportunity to answer adverse material. The weight to be accorded to public interest considerations (in the nature of fair treatment of individuals) which might favour non-disclosure of such a report must be judged according to the circumstances of each case. If allegations against an individual are found, on investigation, to lack any reasonable basis, and they involve no wider issues of public importance (such as whether proper systems and procedures are being followed in government agencies), the public interest in fair treatment of the individual might carry substantial weight in favour of non-disclosure (on the basis that the unsubstantiated allegations ought not to be further disseminated, even though accompanied by an exoneration). However, the public interest in accountability of government agencies and their employees (for the manner in which they expend public funds to carry out their allocated functions in the public interest) will generally always be in issue in such situations. In particular, there is a clear public interest in ensuring that allegations of improper conduct against government agencies and government employees, which appear to have some reasonable basis, are properly investigated, and that appropriate corrective action is taken where individuals, systems or organisations are found to be at fault, and that there is proper accountability to the public, in respect of both process and outcomes, in this regard. Each case must be judged on its own merits, and I consider that the weight*

of relevant public interest considerations (of the kind discussed in this paragraph) clearly favours disclosure of the Seawright Report.

24. The matter in issue does not contain criticisms of individuals. For the most part, it records the course of the investigation made by Mr Turner, and information supplied in the course of that investigation. There are a small number of suggestions for improvement in accounting and management controls (see paragraph 19 above). However, that information is not in the nature of tentative suggestions for investigation of possible wrongdoing or notes pointing to further avenues for investigation. It comprises firm recommendations following consideration of the procedures in existence at the GCTC. Indeed, the date of the second memorandum is the date of the letter informing the applicant of finalisation of the investigation. Furthermore, it is clear that the GCTC accepted that improvements could be made and implemented those improvements: see the letter from Mr Hasemann dated 16 October 2000. I do not consider that there is anything in the documents in issue which could be characterised as an unproven allegation that should not be disclosed in the public interest.

25. The GCTC has contended that it is a private organisation and that its dealings with the QPC should be kept confidential. It contends that the information deals with matters within the GCTC, which should not be subject to public scrutiny (see paragraph 9 above). As I indicated above, Parliament has recognised the interests of individual members of the public, and organisations, in terms of the exemption provisions set out in Part 3, Division 2 of the FOI Act. Parliament has recognised that the very fact that matter concerns an individual's personal affairs gives rise to a public interest consideration favouring non-disclosure. It has not accorded the same level of protection to organisations. Section 45(1) provides that certain material such as trade secrets are exempt matter but that otherwise, a business organisation wishing to avoid disclosure must show a reasonable expectation of an adverse effect before the potential for exemption arises in relation to business information. I am satisfied that there is no general public interest consideration favouring non-disclosure of information about a business or other non-government organisation that would favour non-disclosure merely because the information concerns a non-government organisation.

26. The GCTC did not contend that the matter in issue could reasonably be expected to have an adverse effect on its commercial operations. The QPC made a suggestion to that effect in terms of the application of the public interest balancing test in s.41(1), but did not raise the application of s.45(1)(c) of the FOI Act. There is no material before me to show that disclosure of the matter in issue could reasonably be expected to have such an adverse effect. I have examined the contents of the matter in issue, and I am not satisfied that there is a reasonable basis for expecting that disclosure of the matter in issue could have an adverse effect on the business, commercial or financial affairs of the GCTC. I am satisfied both that the matter in issue does not qualify for exemption under s.45(1)(c) of the FOI Act, and that there is no public interest consideration of significant weight favouring non-disclosure based on that factor.

Adverse effect on individuals by disclosure of matter critical of them

27. It is contended that there is matter critical of individuals in the documents in issue and that, for similar reasons to those discussed in paragraph 23 above, disclosure would therefore be contrary to the public interest. However, I am unable to identify any matter in the documents in issue which could reasonably be characterised as being "criticism of particular people". Some people are mentioned and their activities are described, but there is no suggestion that they have departed from any procedures required by the GCTC. I find that this claim does not raise a public interest consideration of significant weight favouring non-disclosure.

Public interest considerations favouring disclosure

28. The QPC contended that there was no public interest in citizens being informed about the processes of a private club. However, Parliament has seen fit to enact detailed legislation concerning horse racing in Queensland which regulates the activities of clubs and provides for close supervision of clubs, particularly in relation to financial matters. The very operation of a race club is subject to registration by the QPC. Without that registration, the club cannot conduct race meetings. Further, s.134 of the *Racing and Betting Act* regulates in detail the ends to which a club may apply its receipts and profits. Section 130 requires every member of a committee of a club to comply with the provisions of the Act that relate to a club. Section 131 requires clubs to audit their books and to provide financial statements to the QPC. It also provides that the QPC can make such inquiries into and take such action with regard to the statements as it thinks fit. Further, the Minister can request the Auditor-General to examine the books and accounts of any club.

29. It is therefore incorrect to characterise clubs as merely private organisations. Particularly with regard to financial matters (which are the subject of the documents in issue), there is legislation which closely regulates, and requires supervision of, the activities of clubs. I consider that there is a public interest favouring disclosure of information that shows whether or not the GCTC has complied with its obligations under the *Racing and Betting Act.*

30. In carrying out its role to control, supervise and regulate racing (see s.11A(1) of the *Racing and Betting Act*), the QPC has wide powers with respect to race clubs, including the following:

> ***11B.(2)*** *Without limiting subsection (1), the Queensland Principal Club has the powers conferred on it under this Act and may—*
>
> …
>
> *(c) register or license, or refuse to register or license, or cancel or suspend the registration or licence of, a race club, or an owner, trainer, jockey, racing bookmaker, racing bookmaker's clerk or*

another person associated with racing, or disqualify or suspend any of those persons permanently or for a specified period; and

(d) *supervise the activities of race clubs, persons licensed by the Queensland Principal Club and all other persons engaged in or associated with racing; and*

(e) *direct and supervise the dissolution of a race club that ceases to be or is not registered by the Queensland Principal Club; and*

(f) *appoint an administrator to conduct the affairs of a race club; and*

...

(s) *order an audit of the books and accounts of a race club by an auditor who is a registered company auditor; ...*

31. I consider that there is a strong public interest in enhancing the accountability of the QPC for the way in which it conducts investigations relating to the control, supervision and regulation of racing clubs. The QPC has already informed the applicant in general terms of the steps taken in the investigation and the outcome of the investigation: see the letters dated 13 and 16 October 2000 quoted at paragraph 19 above. Nevertheless, I consider that there is a public interest in disclosure of the additional details contained in the documents in issue.

32. There are also references in the documents in issue to the role that officers of the Auditor-General played in the course of the investigation. To that extent, disclosure of the matter in issue would enhance the accountability of that office for the performance of its functions.

Finding

33. I do not consider that the QPC or the GCTC has raised any public interest considerations of significant weight favouring non-disclosure of the particular documents in issue. There are significant public interest considerations favouring disclosure of the documents. I find that disclosure of the documents in issue would not, on balance, be contrary to the public interest. I therefore find that the documents in issue do not qualify for exemption under s.41(1) of the FOI Act.

Application of s.40(a) and (b) of the FOI Act

34. The GCTC has also claimed that the matter in issue is exempt under s.40(a) and (b) of the FOI Act, which provide:

***40.** Matter is exempt matter if its disclosure could reasonably be expected to —*

(a) prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency; or

(b) prejudice the attainment of the objects of a test, examination or audit conducted by an agency; …

35. I have significant doubts that the investigation undertaken by Mr Turner can be regarded as a "test, examination or audit" as those words are used in s.40(a) or s.40(b) of the FOI Act. There is provision for the QPC to examine financial statements given following an audit by a club appointed auditor. There is also provision in the *Racing and Betting Act* for the Auditor-General to conduct an examination of the books and accounts of a club. However, the investigation which Mr Turner undertook falls short of what would, in normal parlance, be regarded as an audit.

36. Even if it could be described as such, I am not satisfied that either of the prejudicial consequences specified in s.40(a) and s.40(b) could reasonably be expected to follow from disclosure of the documents in issue. The GCTC has put forward no additional grounds to support a finding of such prejudice. I have discussed and rejected the grounds that were put forward that might give rise to an expectation of such prejudice in my discussion of the public interest considerations favouring non-disclosure in the context of s.41(1) of the FOI Act.

37. Further, s.40 is subject to a public interest balancing test, and I consider that the public interest considerations favouring disclosure of the documents in issue that I identified in applying s.41(1) alone, are sufficiently strong to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest. I therefore find that the matter in issue does not qualify for exemption under s.40(a) or (b) of the FOI Act.

DECISION

38. I set aside the deemed decision of the QPC refusing access to the documents in issue described at paragraph 6 of my reasons for decision. In substitution for it, I find that those documents do not qualify for exemption from disclosure to the applicant under the FOI Act.