

IN THE CIVIL AND ADMINISTRATIVE TRIBUNAL
Administrative and Equal Opportunity Division

File Number: 1510239

Tom Lonsdale
Applicant

AND

The University of Sydney
Respondent

RESPONDENT'S SUBMISSIONS IN REPLY

The University of Sydney makes the following submissions in reply to:

- (a) the Applicant's submissions, filed on 14 and 28 August 2015; and
 - (b) the Applicant's affidavit, sworn 13 August 2015.
2. The University notes that the Applicant's submissions contain evidentiary material, and the affidavit contains some submissions.
 3. As at the date of these submissions, the Office of the Information Commissioner has not filed its submissions.

The conclusive presumption against disclosure

4. It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the University has waived the privilege (clause 5(1) of Schedule 1 of the *Government Information (Public Access) Act 2009* ('the GIPA Act')).
5. The University notes that the Applicant has made no submissions refuting the University's claim that the relevant documents are legally privileged, except to say that:
 - a) the Office of General Counsel (OGC) has 'suffered a catastrophic failure of its fundamental obligations to the University, the Court and wider community': **Lonsdale affidavit [5]**; and
 - b) the claim of legal professional privilege 'is a betrayal of the needs of the University, its students, clients and the animals under their care': **Lonsdale affidavit [6]**.

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6. The University submits that this conclusive presumption applies to the documents from the legal file 2012/15434 (marked 11-23 of the schedule of documents attached to the review decision), excluding the signed memoranda of understanding attached to document 23 (which are copies of documents 3 and 4).

The public interest considerations against disclosure

1(f) – Could the disclosure reasonably be expected to prejudice the effective exercise by the University of its functions?

7. The Applicant has sought information about ‘research funds, scholarships, agreements and contracts between pet food companies and the University of Sydney, its staff and students’. The University has identified and withheld a number of documents relating to sponsorship arrangements with Royal Canin and Hill’s Pet Nutrition.

Is the information confidential?

8. The Applicant has not disputed that the relevant documents are marked ‘confidential’. He states:

‘The Respondent gives undue weight and makes much of the fact certain documents are marked ‘confidential’. However the GIPA Act provides for the release of information, notwithstanding that information may be marked ‘confidential’: **Lonsdale submissions 14 August 2015 [1]**.

9. However, the Applicant appears to suggest that the information contained in the documents is not confidential, because it is already in the public domain. He states:

‘I suspect that much of the information or close variants of the information is available, in particular as a result of the Murdoch University disclosure of 500 documents’: **Lonsdale submissions 14 August 2015 [11]**.

10. The Applicant has annexed a number of documents relating to Murdoch University’s sponsorship arrangements with Hill’s Pet Nutrition and Royal Canin to his affidavit (see L1-L3). The University notes that the documents released by Murdoch University, including the terms of the sponsorship agreement between Murdoch University and Hill’s Pet Nutrition (L3), are substantively different to the documents withheld by the University.
11. Moreover, even if the words in the documents relating to Murdoch University’s sponsorship arrangements with Hill’s Pet Nutrition and Royal Canin were identical to the

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- words in the documents relating to the University of Sydney's sponsorship arrangements with Hill's Pet Nutrition and Royal Canin, the *information* is not the same. "Information" takes its character from context as well as from the literal meaning of the words that describe it.
12. In this way, the words in the documents relating to Murdoch University's sponsorship arrangements with Hill's Pet Nutrition and Royal Canin provide information about Murdoch University and do *not* provide information about the University of Sydney. Similarly, the words in the documents relating to the University of Sydney's sponsorship arrangements with Hill's Pet Nutrition and Royal Canin provide information about the University of Sydney and do *not* provide information about Murdoch University.
 13. This would be so even if the words happened to be identical (and the University does not concede that they are).
 14. By analogy, the fact that two people have the same name does not make the name of the second person the personal information of the first, nor does the name of the second person provide any information at all about the first person.
 15. Accordingly, the presence in the public domain of information relating to Murdoch University's sponsorship arrangements does not mean that information relating to the University of Sydney's sponsorship arrangements is in the public domain, even if it were the case that the words were identical (which is not conceded).
 16. For the reasons outlined above and in the University's primary written submissions, the documents withheld by the University were provided or created in confidence and contain confidential information about sponsorship arrangements that is not currently in the public domain.

Does the information facilitate the effective exercise of the University's functions?

17. The Applicant has not disputed that, in order to carry out its principal functions in the Faculty of Veterinary Sciences, the University runs a number of conferences and orientation events, designed to prepare students for their final year clinical placements, encourage student engagement with the veterinary profession, and prepare them for graduation.
18. The Applicant has not disputed that the University does not receive government funding to facilitate functions of this nature, and relies on sponsorship arrangements, negotiated with private companies from year to year. He has stated, relevantly:

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'The University has a large, but undisclosed budget made up, I am led to believe, mostly from taxpayer funds and tuition fees. However, the junk pet-food industry contributes relatively small amounts of cash by comparison, but nevertheless controls the entire curriculum through all years of the educational syllabus and all aspects of the so-called scientific endeavour': **Lonsdale submissions 14 August 2015 [5]**.

19. The University denies that 'the junk pet-food industry' controls the Veterinary Sciences curriculum at any stage of veterinary students' studies. The only evidence provided by the Applicant to support this claim is his own unsupported assertion.

Could disclosure of the information reasonably be expected to prejudice the effective exercise by the University of its functions?

20. The Applicant has disputed that disclosure of the information could reasonably be expected to prejudice the effective exercise by the University of its functions. The Applicant has claimed that 'disclosure will ultimately enhance the effective exercise by the University of its functions': **Lonsdale submissions 14 August 2015 [6]**.
21. The University understands the Applicant's arguments in support of this position to be:
- a) '[t]he University is caught in a degrading downward spiral of incompetence and corruption' and 'only by opening up the full extent of the junk pet-food fraud will proper remedial action be possible': **Lonsdale submissions 14 August 2015 [6]**; and
 - b) although 'disclosure of the information sought will most likely cause embarrassment to and loss of confidence in the University', 'the public interest is paramount': **Lonsdale submissions 14 August 2015 [4]**.
22. The University denies that its sponsorship arrangements with Hill's Pet Nutrition and Royal Canin are evidence of incompetence or corruption. Once again, the Applicant's only evidence of any such incompetence or corruption is his own unsupported assertion. The University also denies that the release of information about those sponsorship arrangements would cause embarrassment to or loss of confidence in the University. In any event, the University has not at any time sought to rely on any argument based on embarrassment or loss of confidence in support of its case.
23. The University's sponsorship arrangements with Hill's Pet Nutrition and Royal Canin are lawful and proper.

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24. Disclosure of the withheld information would have an adverse effect on the University's current sponsorship arrangements, because the sponsors' confidential information and the terms of the sponsorship agreements would be revealed to other commercial entities. This would impact on the Faculty of Veterinary Science's ability to negotiate future sponsorship arrangements, thereby limiting the Faculty of Veterinary Science's ability to run conferences and orientation events for students, and prejudicing the effective exercise by the University of its functions.

1(g) - Could the disclosure reasonably be expected to found an action against the University for breach of confidence or otherwise result in the disclosure of information provided to the University in confidence?

25. The documents withheld by the University were provided or created in confidence, contain confidential information about sponsorship arrangements, and are not currently in the public domain.
26. The Applicant has not disputed that disclosure of the withheld information could reasonably be expected to found an action against the University for breach of confidence or otherwise result in the disclosure of information provided to the University in confidence.

3(a) - Could the disclosure reasonably be expected to reveal an individual's personal information?

27. The Applicant has not disputed that the withheld information includes the names of individual employees of Royal Canin and Hill's Pet Nutrition, or that disclosure of their names could reasonably be expected to reveal several individuals' personal information.

4(b) - Could the disclosure reasonably be expected to reveal commercial in confidence provisions of a government contract?

28. The Applicant has not disputed that the agreements between the University of Sydney and each of Royal Canin and Hill's Pet Nutrition are contracts under which Royal Canin and Hill's Pet Nutrition agree to provide the sponsorship fee in exchange for the sponsorship benefits, and so fall within paragraph (b) of the definition of 'government contract'.

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Do the contracts contain commercial-in-confidence provisions, the disclosure of which could reasonably be expected to reveal commercial in confidence provisions?

29. The Applicant has submitted (at page 3 of his affidavit) that Hill's Pet Nutrition has a 'global program devoted to buying access to veterinary students and veterinarians'. He states:

'Even if a University OGC officer were totally enamoured of junk pet-food products made by the multinational conglomerate Colgate-Palmolive, that officer should surely take any opportunity to strike a better deal for the University and indeed for all Australian universities. Under those circumstances, a 'bidding war' between giant multinationals would be precisely in the public interest and should be encouraged': **Lonsdale affidavit 13 August 2015 [7]**;

30. The Applicant, by his references to a 'bidding war', has impliedly acknowledged that disclosure of the withheld information could adversely impact on Hill's Pet Nutrition's bargaining power. The University maintains that the agreements contain details of matters the disclosure of which would place Royal Canin and Hill's Pet Nutrition at a commercial disadvantage in relation to other potential contractors in the future, for the purposes of paragraph (e) of the definition of 'commercial-in-confidence'. For example, the agreements contain details of sponsorship fees and sponsorship benefits.

31. The University notes that the Administrative Decisions Tribunal has previously given significant weight to the protection of sensitive commercial information belonging to private entities in their dealings with government, and has recognised that there is a significant public interest in protecting that information.

32. There is a sound policy reason for this position. As a general matter, there are very few avenues for obtaining the commercial information of a private entity. This position ought not be reversed entirely only because a private entity has dealings with a government agency, and some of its commercial information becomes government information for the purposes of the GIPA Act. Accordingly, it is appropriate for the Tribunal to give significant weight to the sensitive commercial nature of the information in issue.

4(d) - Could the disclosure reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests?

33. The Applicant, by his references to a 'bidding war', has impliedly acknowledged that disclosure of the withheld information could prejudice the interests of the University's sponsors.

34. The disclosure of the withheld documents could reasonably be expected to prejudice the legitimate business, commercial, or financial interests of Royal Canin and Hill's Pet Nutrition. The University relies on the content of the withheld documents, and on the letter from Hill's Pet Nutrition dated 8 January 2015.

Is there an overriding public interest against disclosure? (Do the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure?)

35. The Applicant has submitted that:

'the public ought to be made aware (through the release of relevant documentation) of any commercial agreements between Sydney University and Pet Food manufacturers as these agreements may and likely do impact on the scientific integrity and educational objectivity of course material and teaching methods': ***Lonsdale submissions 14 August 2015 [1]***.

36. The Applicant has filed a voluminous amount of material in support of his opinion that manufactured pet food (such as that produced by Hill's Pet Nutrition and Royal Canin) is bad for pet health and nutrition. The University does not dispute the public importance of:

- a) pet health;
- b) pet nutrition; and
- c) the independence of veterinarians and university vet schools from improper influence.

37. However, the Applicant's opinion that manufactured pet food is bad for animals is not probative as to the public interest considerations in favour of disclosure outweigh the public interest considerations against disclosure of information concerning the University's sponsorship arrangements with Hill's Pet Nutrition and Royal Canin.

38. It is well accepted that proceedings under the GIPA Act, like those under the former *Freedom of Information Act 1989* (NSW), should not be used 'as a vehicle for the collateral review of the merits or validity of official action.'¹ The desirability of the University's sponsorship arrangements with Hill's Pet Nutrition and Royal Canin is not, of itself, an issue for determination by the Tribunal.

¹ See *Raven v The University of Sydney* [2015] NSWCATAD 104 at [45] citing *Crewdson v Central Sydney Area Health Service* [2002] NSWCA 345 at [24].

Documents marked 11-23 (from Legal File 2012/15434)

39. The University maintains that, on the basis of the conclusive presumption in clause 5 of Schedule 1 to the GIPA Act, there is an overriding public interest against disclosure of the privileged information contained in the documents marked 11-23 in the University's schedule of documents (from the legal file 2012/15434), excluding the signed memoranda of understanding attached to document 23, which are copies of documents 3 and 4, and to which the arguments made below in respect of documents 3 and 4 apply.

Documents marked 1-10

40. The University maintains that disclosure of the information sought by the Applicant and marked 1-10 in the University's schedule of documents could reasonably be expected to have one or more of the following effects listed in the table to section 14 of the GIPA Act:

- 1(f) - prejudice the effective exercise by the University of its functions;
- 1(g) - found an action against the University for breach of confidence or otherwise result in the disclosure of information provided to the University in confidence;
- 3(a) - reveal an individual's personal information;
- 4(b) - reveal commercial in confidence provisions of a government contract;
- 4(d) - prejudice any person's legitimate business, commercial, professional or financial interests.

Should the Tribunal affirm, vary or set aside the University's review decision?

41. The University respectfully submits that the Tribunal should affirm the University's review decision, dated 2 February 2015.

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Sarah Heesom
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Date: 10 September 2015