

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 08/2001

Application S 307/00

Participants:

SHANE BARKER

Applicant

WORLD FIREFIGHTERS GAMES, BRISBANE, 2002

Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - jurisdiction of Information Commissioner - whether the respondent is an agency subject to the application of the *Freedom of Information Act 1992* Qld - whether the respondent is "a body...that is established by government for a public purpose under an enactment" within the terms of s.9(1)(a)(ii) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.4, s.7, s.8(1), s.9(1)(a)(i), s.9(1)(a)(ii), s.11(1), s.11(1)(n), s.11(1)(q), s.21, s.25, s.27(2), s.75

Freedom of Information Regulation 1992 Qld s.5(1)(d), s.5(1)(e)

Associations Incorporation Act 1981 Qld

Financial Administration and Audit Act 1977 Qld s.44

Attorney-General v Estcourt and The Wilderness Society Inc (1995) 4 Tas R 355

Christie and Queensland Industry Development Corporation, Re (1993) 1 QAR 1

English and Queensland Law Society Inc, Re (1995) 2 QAR 714

The Local Government Association of Queensland v Information Commissioner & Anor [2001] QSC 052, 1 March 2001

McPhillimy and Gold Coast Motor Events Co, Re (1996) 3 QAR 376

Price and The Local Government Association of Queensland, Re (Information Commissioner, Qld, Decision No. 04/2000, 8 December 2000, unreported)

Queensland Law Society Inc v Albietz and Anor (1996) 2 Qd R 580

Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor (1992) 36 FCR 111

Victorian Public Service Board v Wright (1986) 160 CLR 145

DECISION

I decide that -

- (a) the respondent is a body that is established by government for a public purpose under an enactment, within the meaning of s.9(1)(a)(ii) of the *Freedom of Information Act 1992* Qld, and hence, by virtue of s.8(1), is an agency for the purposes of the *Freedom of Information Act 1992* Qld.
- (b) I have jurisdiction under Part 5 of the *Freedom of Information Act 1992* Qld to deal with the applicant's application for review of the respondent's refusal of access to documents requested under the *Freedom of Information Act 1992* Qld.

Date of decision: 27 September 2001

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D J BEVAN
INFORMATION COMMISSIONER

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SHANE BARKER
Applicant

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REASONS FOR DECISION

Background

1. This application requires determination of a jurisdictional issue as to whether or not World Firefighters Games, Brisbane, 2002 ("WFG") is an agency subject to the application of the *Freedom of Information Act 1992* Qld (the FOI Act). WFG is an Australian public company limited by guarantee which was established to organise and stage the World Firefighters Games that were planned to be held in Brisbane in 2002.
2. By letter dated 30 October 2000, the applicant applied to WFG for access, under the FOI Act, to a wide range of documents. Having received no acknowledgement of his FOI access application, the applicant reiterated the terms of his application in a letter to WFG dated 15 November 2000. By letter dated 24 November 2000, Mr Gavin Gabrielson, General Manager of WFG, replied stating: *"I am advised that as World Firefighters Games Brisbane 2002 is a private company, it is not subject to the FOI legislation. Accordingly, your request under the legislation is denied."* By letter dated 5 December 2000, the applicant applied to this Office for review, under Part 5 of the FOI Act, of WFG's decision to refuse him access to documents under the FOI Act.

Jurisdiction of the Information Commissioner

3. The former Information Commissioner, Mr F N Albietz, considered the nature and extent of the powers and functions of the Information Commissioner in relation to jurisdictional issues of this kind in a number of cases, including *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1 at pp.4-6, and *Re English and Queensland Law Society Inc* (1995) 2 QAR 714 at pp.719-720. I adopt the reasons given by Commissioner Albietz in those cases. I consider that the Information Commissioner has both the power, and a duty, to consider and determine issues relating to the limits of his jurisdiction, when they are raised as an issue in an application for review lodged under Part 5 of the FOI Act.

(See also the comments on the obligation of a tribunal to decide a dispute over the limits of its jurisdiction, contained in the judgment of Wright J of the Supreme Court of Tasmania in *Attorney-General v Estcourt and The Wilderness Society Inc* (1995) 4 Tas R 355 at pp.365-367.)

4. By letter dated 11 December 2000, the Deputy Information Commissioner advised WFG that, consistently with the approach adopted in *Re English* (a case which dealt with the issue of whether or not the Queensland Law Society Inc was an agency subject to the application of the FOI Act), he proposed to undertake preliminary inquiries, in accordance with s.75 of the FOI Act, for the purpose of determining whether the Information Commissioner has power to review the matter to which the applicant's external review application relates, i.e., whether WFG is an "agency" for the purposes of the FOI Act. The Deputy Information Commissioner invited WFG to lodge written submissions and/or evidence explaining precisely how, and pursuant to what legal authority, it is constituted/established, and setting out all facts, matters and circumstances, and any legal arguments, on which WFG wished to rely in support of its contention that it is not an agency subject to the application of the FOI Act.
5. The solicitors for WFG (Gadens Lawyers) responded by letter dated 22 December 2000, in which they made a number of submissions in support of their client's case (and which also forwarded a copy of WFG's Constitution which details the objects for which WFG was established).
6. The submissions on behalf of WFG were provided to the applicant, who lodged submissions in response dated 31 January 2001. On 25 July 2001, Commissioner Albietz wrote to WFG's solicitors to advise them that, after reviewing all relevant material then before him, he had formed the preliminary view that WFG is an agency subject to the FOI Act. In the event that WFG did not accept his preliminary view, Commissioner Albietz invited its solicitors to lodge submissions and/or evidence in support of WFG's case. Such submissions were provided by WFG's solicitors under cover of a letter dated 9 August 2001.
7. In making my decision on the jurisdictional issue, I have taken into account the submissions made by WFG's solicitors, as well as the relevant provisions of the FOI Act and documents relating to the establishment of WFG provided to me as attachments to the application for external review, and as attachments to the applicant's written submission dated 30 January 2001. I will discuss those submissions/documents in detail below.
8. I note that, during the course of this review, it was decided to cancel the World Firefighter's Games which had been planned to be staged in Brisbane in 2002. As I stated above, WFG was established to organise and stage the Games. Upon the cancellation of the Games, there were discussions with the applicant and the respondent regarding whether or not WFG was likely to be wound up prior to my giving a decision in this review. However, solicitors acting for WFG's Board advised that, given the variety of outstanding matters involving WFG, it was not anticipated that the company was likely to be wound up before the end of this year. Accordingly, it was agreed that I should proceed to give my decision regarding whether or not WFG is an agency subject to the application of the FOI Act.

The relevant provisions of the FOI Act

9. The following provisions of the FOI Act are relevant to the determination of the issue of whether or not WFG is an agency subject to the application of the FOI Act:

Preamble

An Act to require information concerning documents held by government to be made available to members of the community, to enable members of the community to obtain access to documents held by government and to enable members of the community to ensure that documents held by the government concerning their personal affairs are accurate, complete, up-to-date and not misleading, and for related purposes.

...

Object of Act

4. The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.

...

7. In this Act—

"agency" has the meaning given by section 8;

...

"enactment" means an Act or a statutory instrument;

...

"public authority" has the meaning given by section 9; ...

8.(1) In this Act—

"agency" means a department, local authority or public authority.

...

9.(1) In this Act—

"public authority" means—

(a) a body (whether or not incorporated) that—

...

(ii) is established by government for a public purpose under an enactment.

...

21. Subject to this Act, a person has a legally enforceable right to be given access under this Act to—

(a) documents of an agency; ...

10. Section 21 of the FOI Act provides that, subject to the provisions of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency. Section 8(1) defines "agency". Since WFG is neither a department nor a local authority within that definition, the issue is whether or not it is a "public authority" as defined in s.9(1)(a)(ii) of the FOI Act. If it is, then WFG is subject to the obligations imposed on agencies by the FOI Act, and, pursuant to s.21, the applicant has a legally enforceable right (subject to the application of other provisions of the FOI Act, e.g., the exemption provisions contained in Part 3, Division 2, of the FOI Act) to be given access to documents held by WFG. If, however, WFG is not a "public authority" within the terms of s.9(1)(a)(ii) of the FOI Act, it is not subject to the application of the FOI Act, and I have no jurisdiction to deal further with the application for review.

Discussion of WFG's submissions

11. At the commencement of this external review, the Deputy Information Commissioner informed WFG that he considered it was arguable that WFG is a public authority within the terms of s.9(1)(a)(ii) of the FOI Act, i.e., that it is a body established by government under an enactment (the Corporations Law). The Deputy Information Commissioner expressed the view that the public purpose would be the expenditure of public funds to stimulate or subsidise desirable economic activity (*cf. Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376 at paragraphs 22-23).
12. The central argument which WFG's solicitors raised in response in their letter dated 22 December 2000 was that, on its proper construction, s.9(1)(a)(ii) of the FOI Act requires that the public purpose, for which the body in question was established, be specified in the relevant enactment. The solicitors for WFG submitted that there is no enactment which directly provides for, or effects, the establishment of WFG to carry out any particular public purpose in accordance with that enactment. The purposes for which WFG was established are set out in its Constitution, and are not provided for in any enactment.
13. In response, by letter dated 25 July 2001, Commissioner Albietz forwarded to WFG's solicitors a copy of his decision in *Re Price and The Local Government Association of Queensland* (Information Commissioner, Qld, Decision No. 04/2000, 8 December 2000, unreported) in which he had examined in detail the wording used in s.9(1)(a)(i) of the FOI Act. At paragraph 19, he said:

The issue turns on the proper construction of the words "a body ... that is established for a public purpose by an enactment". Giving the words their natural and ordinary meaning, I consider that they specify two qualifications on the word "established", i.e., that the body is established by an enactment, and that the body is established for a public purpose. I do not consider that the words convey a requirement that the public purpose be specified in the enactment which establishes the body.

14. Commissioner Albietz's decision in that regard was upheld, on judicial review, by Atkinson J of the Queensland Supreme Court in *The Local Government Association of Queensland v Information Commissioner & Anor* [2001] QSC 052, 1 March 2001.

15. Applying to s.9(1)(a)(ii) of the FOI Act the interpretive approach that he considered had been endorsed by the Supreme Court in the above-noted decision, Commissioner Albietz informed WFG's solicitors that it was his preliminary view that the wording of s.9(1)(a)(ii) requires, firstly, that the body in question be established by government for a public purpose, and secondly, that the body be established under an enactment. Commissioner Albietz said that he did not consider that s.9(1)(a)(ii) requires that the public purpose for which the body is established be specified in the enactment. Indeed, he said that he considered that the argument in that regard in respect of s.9(1)(a)(ii) was even weaker than the corresponding argument put by the Local Government Association of Queensland in respect of s.9(1)(a)(i), and rejected by Supreme Court, because the enactments under which the government would most commonly be expected to establish a body (i.e., other than a body established by an enactment - which is the situation covered in s.9(1)(a)(i) of the FOI Act) are the Corporations Law, and the *Associations Incorporation Act 1981* Qld, which are statutes of general application, containing no provision that specifies public purposes for bodies established under them.
16. In response, WFG's solicitors argued that Commissioner Albietz's decision involving the Local Government Association of Queensland (and Atkinson J's subsequent judicial review decision in the Supreme Court) dealt only with the correct interpretation to be applied to the words used in s.9(1)(a)(i) of the FOI Act and were not authoritative decisions regarding the correct interpretation to be given to the particular wording used in s.9(1)(a)(ii). WFG's solicitors maintained their argument that the wording of s.9(1)(a)(ii) requires that the public purpose of the body in question be a public purpose established by, or set out under, the specific enactment which creates, or allows for the creation of, that body for those purposes.
17. Secondly, WFG's solicitors argued that the approach endorsed by Commissioner Albietz in his letter dated 25 July 2001 was too broad:

Such an approach, if correct, would be likely to subject private and philanthropic institutions set up for charitable purposes, or by bodies such as the Tourism Council of Australia or other similar bodies, to the legislation. These could include private bodies which promote tourism in Queensland and the economy of Queensland such as the Noosa Triathlon or the Gold Coast Marathon or the Maleny Folk Festival to be subject to the FOI Act. With respect, this is and was clearly not intended by the Act. Public purposes and public benefit (particularly in economic terms) is a very broad and far-reaching yardstick. The way in which Parliament has limited the application of that yardstick (so far as the FOI Act is concerned) is by the requirement to associate the public purposes directly with government by requiring that the body must be a body established by Parliament or the executive arm of government or its agencies under a specific enactment which sets out the public purposes of that body in that enactment.

[solicitors' underlining]

18. As regards the first of the issues raised by WFG's solicitors, I acknowledge that the decisions of Commissioner Albietz and of Atkinson J concerning the status of the Local Government Association of Queensland involved only the interpretation of s.9(1)(a)(i) of the FOI Act. Nevertheless, I consider that the reasoning which was applied in those cases regarding the correct approach to the interpretation of s.9(1)(a)(i) is equally relevant and applicable to the interpretation of the words used in s.9(1)(a)(ii). Giving the words of s.9(1)(a)(ii) their

natural and ordinary meaning, I consider that they specify three qualifications on the word "established", i.e., that the body in question is established by government, that it is established for a public purpose, and that it is established under an enactment. I do not consider that the words convey a requirement that the public purpose be specified in the enactment under which the body is established.

19. If there be any ambiguity in that regard, I consider that established principles for the construction of beneficial, remedial legislation, such as the FOI Act, favour the construction I regard as correct. I note that it has been accepted by both the High Court of Australia, and a Full Court of the Federal Court of Australia, that, in the context of freedom of information legislation, it is proper to resolve a genuine ambiguity in the words of the legislation in favour of an interpretation which would further, rather than hinder, access to information: see, respectively, *Victorian Public Service Board v Wright* (1986) 160 CLR 145 at p.153, and *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111 at p.115. Derrington J espoused a similar view in *Queensland Law Society Inc v Albietz and Anor* (1996) 2 Qd R 580 at p.585:

This conclusion is consistent with what might be discerned to be the policy of the Freedom of Information legislation in respect of relevant matters. Its remedial nature is directed towards opening to public scrutiny the information relating to public affairs held by agencies of the government. This militates against a restrictive reading of the kind posited by the Society.

20. These principles were also endorsed and applied (to the interpretation of s.9(1)(a)(i) of the FOI Act) by Atkinson J in *The Local Government Association of Queensland Inc v Information Commissioner & Anor* at paragraphs 6-8.
21. It is consistent with the objects of the FOI Act that a body established by government under an enactment, which performs functions for the benefit of the public or a substantial segment of the public (i.e., for public purposes), should be subject to the application of the FOI Act, irrespective of whether the public purpose is or is not specified in the enactment under which the body was established.
22. If a body is caught by the definition of "public authority" in s.9 of the FOI Act, and, as a matter of policy, the Parliament does not want that body to be subject to the application of the FOI Act, a mechanism has been provided for exclusion: either the FOI Act could be amended to specify the body in a paragraph of s.11(1) of the FOI Act, or the body could be specified in a regulation made under s.11(1)(q) of the FOI Act.
23. I cannot accept that Parliament intended that a body established by government, for a public purpose, under the Corporations Law or the *Associations Incorporation Act 1981*, would be excluded from the application of the FOI Act because it was established under an enactment that does not set out the public purposes for which the body is established. Indeed, the FOI Act and the *Freedom of Information Regulation 1992* Qld partially exempt from the application of the FOI Act certain bodies established by government for a public purpose, and established by way of incorporation under the Corporations Law. This necessarily implies that they would otherwise be caught by s.9(1)(a)(ii) of the FOI Act. For example, s.11(1)(n) of the FOI Act provides Treasury Holdings Pty Ltd, and its wholly owned subsidiaries within the meaning of the Corporations Law, with a partial exclusion from the application of the FOI Act in respect of documents concerning their commercially competitive activities. They are bodies established by government for a public purpose and

established under the Corporations Law, rather than under an enactment that sets out their public purpose. Similarly, Queensland Events Corporation Pty Ltd and Gold Coast Events Co Pty Ltd are given a partial exclusion from the application of the FOI Act by s.5(1)(d), and s.5(1)(e), respectively, of the *Freedom of Information Regulation 1992*. They are also bodies established by government, under the Corporations Law, for public purposes.

24. I reject the submission by WFG's solicitors that the interpretation of s.9(1)(a)(ii) explained in paragraph 18 above is too broad, and would result in private or charitable bodies being caught by the terms of that provision. I have examined the position of the bodies cited by the applicant's solicitors in their submission, as quoted at paragraph 17 above. The Tourism Council of Australia ceased operating at the end of 2000. The Queensland branch of that body has now been replaced by an organisation known as the Queensland Tourism Industry Corporation (QTIC). Its members comprise various tourism industry representatives and its aim is to represent the interests of the tourism industry and to lobby the government in relation to achieving those interests. There is nothing in the material I have examined regarding the establishment and membership of the QTIC to suggest that it would fall within the terms of s.9(1)(a)(ii) of the FOI Act.
25. The Gold Coast Marathon is a registered business name of Gold Coast Events Management Ltd, a wholly owned subsidiary of Queensland Events Corporation Pty Ltd, which is a government-owned company that falls within the ministerial responsibilities of the Premier of Queensland. Queensland Events Corporation and its wholly owned subsidiaries are clearly agencies subject to the application of the FOI Act: that is recognised in the fact that they have been conferred with a partial exclusion from the application of the FOI Act in respect of documents relating to their competitive commercial activities (see s.5(1)(d) of the *Freedom of Information Regulation 1992* Qld, read in conjunction with s.11(1)(q) of the FOI Act). Documents in the possession or control of Queensland Events Corporation or its wholly owned subsidiaries are subject to the application of the FOI Act, unless it can be demonstrated that they relate to their competitive commercial activities. The Noosa Triathlon is a sporting and social event coordinated by United Sports Marketing in conjunction with the Noosa Triathlon Association and the Noosa Heads Lions Club. While the event receives some government funding, I am unaware of any statutory basis for its existence, or of any government involvement in its establishment, such that it could be considered to be a body that is established by government for a public purpose under an enactment, in accordance with s.9(1)(a)(ii) of the FOI Act.
26. The Maleny Folk Festival also receives financial and other support from government agencies (as well as from festival partners, community organisations, *et cetera*) but is organised by the Queensland Folk Federation Incorporated, a community-based non-profit organisation whose object is to foster folk culture. There is nothing in the model rules of the Queensland Folk Federation to suggest that the Federation would satisfy the definition of a body that is established by government for a public purpose under an enactment, within the meaning of s.9(1)(a)(ii) of the FOI Act.
27. In response to the contention by WFG's solicitors that the interpretation of s.9(1)(a)(ii) of the FOI Act explained in paragraph 18 above would lead to private charitable institutions being caught by s.9(1)(a)(ii), I have been unable to find an example of such a case and WFG's solicitors have not referred me to any. It must be remembered that the words of s.9(1)(a)(ii) of the FOI Act require that the body in question be established by government. This eliminates, from the scope of the provision, privately established bodies.

Summary of Findings

28. In summary, I find that, on its correct interpretation, s.9(1)(a)(ii) of the FOI Act requires that the body in question be established by government, that it be established for a public purpose, and that it be established under an enactment. Applying that interpretation to WFG, I find that WFG is a body that was established under an enactment, i.e., the Corporations Law. I also find that it was established by government, i.e., by the Queensland Fire and Rescue Authority (QFRA) and/or the Department of Emergency Services. (I note that, under the definition in s.7 of the FOI Act, "government" includes an agency, and both the QFRA and the Department of Emergency Services are clearly agencies.) The material before me includes copies of the constitution of WFG, the Underwriting and Financial Support Agreement between WFG and the QFRA, a service agreement between WFG and the QFRA, legal advice obtained by the QFRA on the most suitable structure for the QFRA to develop, organise and implement the games, and a letter dated 11 November 1998 from the Minister for Emergency Services seeking the approval of the Treasurer, in accordance with s.44 of the *Financial Administration and Audit Act 1997* Qld for a department to form, or participate in the formation of, a company. It is clear from that material that WFG was established by the QFRA and/or the Department of Emergency Services, which appointed their respective chief executive officers as directors of WFG.
29. The purpose for which WFG was established, as set out in its Constitution, was the purpose of securing, organising and staging the World Firefighters' Games in Brisbane in 2002. I consider that that is properly to be characterised as a public purpose, within the terms of s.9(1)(a)(ii) of the FOI Act. One purpose of the Games was to promote the skills of firefighters to aid the tasks they perform on behalf of the public. That was to be done in the format of a sports competition, with television and radio coverage, and with associated functions, seminars, trade exhibitions and marketing opportunities, which had the aim of benefiting Queensland and its economy, as host of the Games. I refer to the following extract from *Hansard* (16 November 2000) when, in response to a question about the Games, the Minister for Emergency Services said:
- ... *The World Firefighter Games in 2002 is going to be a wonderful event for Queensland.*
- ... *we are expecting at least 6,000 firefighters from throughout the world to gather in Brisbane in 2002. That is a wonderful event for tourism in Queensland and it is a wonderful event for the economy of Queensland. ...*
30. In an article appearing in *The Courier Mail* on 5 January 2001, the Minister was quoted as saying that the Games would generate between \$12-15 million direct economic benefit to Queensland, and attract up to 10,000 competitors and their families. As Commissioner Albietz observed in *Re McPhillimy and Gold Coast Motor Events Co* (at paragraphs 22-23), a body established for a purpose of expending public funds to stimulate or subsidise desirable private sector economic activity is a body established for a public purpose.
31. I also note that another purpose for staging the Games was to raise money for the Royal Children's Hospital burns unit (provision in that regard was made in WFG's Constitution), which again is clearly a public purpose.
32. As I stated above, the Games have now been cancelled. However, their cancellation does not affect my analysis of the purposes for which WFG was established.

33. I am satisfied that WFG is a public authority within the terms of s.9(1)(a)(ii) of the FOI Act because it is established by government, it is established for a public purpose, and it is established under an enactment.

Conclusion

34. For the foregoing reasons, I decide that:
- (a) WFG is an agency subject to the application of the FOI Act, because it is a body that is established by government for a public purpose under an enactment, within the terms of s.9(1)(a)(ii) of the FOI Act;
 - (b) in his letter dated 30 October 2000, the applicant made a valid application for access to documents under s.25 of the FOI Act;
 - (c) WFG thereby came under a legal obligation, imposed by s.27(2) of the FOI Act, to consider the application, and to make one or more of the decisions referred to in s.27(2);
 - (d) having been refused access to documents sought in his FOI access application, the applicant was entitled to make an application for external review under Part 5 of the FOI Act, and, as Information Commissioner, I have jurisdiction to investigate and review WFG's refusal of access.
35. I will write to WFG separately, giving directions for the further conduct of this review, specifically in regard to any documents covered by the terms of the applicant's FOI access application in respect of which WFG claims to be entitled, under the exemption provisions contained in the FOI Act, to refuse the applicant access.

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D J BEVAN
INFORMATION COMMISSIONER