

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 04/2000

Application S 52/00

Participants:

RONALD JOHN PRICE

Applicant

THE LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND
(INCORPORATED)

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 for a public purpose by an enactment" within the terms of s.9(1)(a)(i) of the *Freedom of Information Act 1992* Qld.

Acts Interpretation Act 1954 Qld s.7(1)

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

Local Government Act 1993 Qld s.20, s.25, s.799, s.1194(1), s.1194(3), s.1195(1)(b), s.1196

Statutory Instruments Act 1992 Qld s.7

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

Attorney-General (UK) v Heinemann Publishers Pty Ltd (1987) 10 NSWLR 86

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

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

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

Searle Australia Pty Ltd v Public Interest Advocacy Centre (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 for a public purpose by an enactment within the meaning of s.9(1)(a)(i) of the *Freedom of Information Act 1992* Qld, and hence, by virtue of s.8, 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: 8 December 2000

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This application requires determination of a jurisdictional issue as to whether or not the Local Government Association of Queensland (Incorporated) (the LGAQ) is an agency subject to the application of the *Freedom of Information Act 1992 Qld* (the FOI Act).
2. By letter dated 11 February 2000, the applicant applied to the LGAQ for access, under the FOI Act, to all documents held by the LGAQ concerning the applicant, his family and his property. By letter dated 14 February 2000, Mr G Hallam, Executive Director of the LGAQ, replied stating: "*The Local Government Association of Queensland is not subject to the Freedom of Information Act and your application is refused.*" By letter dated 15 February 2000, the applicant requested an internal review of Mr Hallam's decision. The LGAQ did not respond, and the applicant again wrote to the LGAQ on 28 February 2000. Mr Hallam responded by letter dated 3 March 2000 in terms which indicated that the LGAQ was not prepared to enter into further correspondence with the applicant regarding his purported FOI access application. The applicant then applied to me for review, under Part 5 of the FOI Act, of the LGAQ's decision to refuse him access to documents under the FOI Act.

Jurisdiction of the Information Commissioner

3. I have considered the nature and extent of my powers and functions in relation to jurisdictional issues of this kind in a number of previous 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. For the reasons given in those cases, I consider that I have both the power, and a duty, to consider and determine issues relating to the limits of my 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, 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. Accordingly, by letter dated 1 March 2000, I advised the LGAQ that, consistently with the approach I had adopted in *Re English* (a case which dealt with the issue of whether or not the Queensland Law Society Inc. (the QLS) was an agency subject to the application of the FOI Act), I proposed to undertake preliminary inquiries, in accordance with s.75 of the FOI Act, for the purpose of determining whether I had power to review the matter to which the applicant's external review application relates, i.e., whether the LGAQ is an "agency" for the purposes of the FOI Act. I invited the LGAQ to lodge written submissions and/or evidence explaining precisely how, and pursuant to what legal authority, the LGAQ is constituted/established, and setting out all facts, matters and circumstances, and any legal arguments, on which the LGAQ 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 the LGAQ, King & Company, responded by letter dated 17 March 2000, in which they made a number of submissions in support of their client's case (and which also forwarded a copy of the LGAQ's Constitution and Rules).
6. The submissions on behalf of the LGAQ were provided to the applicant, who lodged submissions in response dated 17 July 2000. They too were exchanged, and King & Company lodged a reply, dated 31 July 2000, on behalf of the LGAQ. In making my decision on the jurisdictional issue, I have taken into account the material referred to in this paragraph, and the preceding paragraph, as well as the relevant provisions of the FOI Act and the *Local Government Act 1993 Qld.*

The relevant provisions of the FOI Act

7. The following provisions of the FOI Act are relevant to the determination of the issue of whether or not the LGAQ 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.

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—*

(i) *is established for a public purpose by an enactment; or*

...

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; ...*

8. 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 defines "agency". Since the LGAQ 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 of the FOI Act. If it is, then the LGAQ 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, eg., the exemption provisions contained in Part 3, Division 2, of the FOI Act) to be given access to documents held by the LGAQ. If, however, the LGAQ is not a "public authority" within the terms of s.9 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.

The LGAQ's submissions

9. The LGAQ has submitted that the only limb of s.9 which is of possible application to the LGAQ is s.9(1)(a)(i), i.e., "a body (whether or not incorporated) that is established for a public purpose by an enactment". I have summarised below the main contentions from the written submissions lodged in support of the LGAQ's case that it does not fall within the terms of s.9(1)(a)(i) of the FOI Act:

- The LGAQ is established by the provisions contained in Chapter 18, Part 1 of the *Local Government Act 1993* Qld.
- The purposes for which the LGAQ was established are not specified by the *Local Government Act*, nor by any other enactment.
- Section 9(1)(a)(i) of the FOI Act requires not only that the entity in question be established by an enactment, but that the public purpose for which the entity was established must also be specified by the enactment.
- As the purpose for which the LGAQ was established, whether it be public or private, is not established by the *Local Government Act* or by any other enactment, the LGAQ does not fall within the terms of s.9(1)(a)(i) of the FOI Act.
- The fact that a "public purpose" for the establishment of the LGAQ is not specified in the provisions of the *Local Government Act* which establish the LGAQ supports the contention that the LGAQ is a private authority rather than a public authority. The purpose of the LGAQ is something for the LGAQ itself to decide. Parliament has left the LGAQ with the autonomy to decide the role it wishes to play.
- The LGAQ is a private association of local governments, albeit with some statutory basis. Membership is voluntary. Its role is to act as the peak employer representative and lobby group for local government. It performs the same function as a confederation of industry, or trade union, or similar representative body.
- The LGAQ has no legal power to affect the rights or interests of any member of the public. The purposes of the LGAQ are private, depending upon the wishes of the members, as expressed by resolution. If the LGAQ decides to carry out a purpose which happens to be a public purpose, the public nature of the purpose does not detract from it being a private purpose of the members of the LGAQ.
- Although some of the functions of the LGAQ as outlined in clause 1 (the objects clause) of its Constitution and Rules could be categorised as public purposes, they are not public purposes for which the LGAQ was established by virtue of the *Local Government Act*. They are the private desires of the LGAQ, which it has decided to pursue itself.
- Merely because a body (which is established by legislation) decides to promote a particular public purpose, does not automatically mean that it is subject to the application of the FOI Act. The intention of the FOI Act is to ensure access to documentation relating to a public purpose conducted by Government or its instrumentalities.
- A private body (albeit one that is established by legislation) which carries out no public purpose by virtue of its establishing legislation, ought not be subject to the FOI Act simply because it determines, as a private decision, to carry out a purpose which is also a public purpose.

Application of s.9(1)(a)(i) of the FOI Act to the LGAQ

10. There is no doubt that the LGAQ is established by an enactment. Section 1194(1) of the *Local Government Act 1993* Qld provides:

1194.(1) The Local Government Association of Queensland (Incorporated) is established under this Act.

11. Thus, although a Local Government Association of Queensland had existed for decades beforehand, the present incarnation of the LGAQ was established as a legal entity by s.1194 of the *Local Government Act*.
12. To my mind, there is also no doubt that the LGAQ is established for public purposes. Rule 1 of the LGAQ's Constitution and Rules provides:

-OBJECTS-

1. *The objects of the Association are to:-*
- (a) *facilitate consultation by and between Members as to their common interests;*
 - (b) *act as a:-*
 - (i) *peak body representing the interests of the local government industry generally; and*
 - (ii) *representative body for Members and/or groups of Members, for the purpose of providing effective and professional representation in dealings between local government and other levels of government, industry, the media and the public generally;*
 - (c) *provide professional advice to assist Members in matters of doubt and difficulty;*
 - (d) *provide, and facilitate the provision of, goods and services to Members;*
 - (e) *watch over and protect the interest, rights and privileges of Members;*
 - (f) *promote the efficient carrying out of local government throughout Queensland;*
 - (g) *generally, undertake or promote any activity which the Executive determines to be for the benefit and/or interest of local government in Queensland.*

13. Rule 4 provides:

-MEMBERSHIP-

4. *The following bodies are entitled to be Members of the Association:-*
- (a) *Local governments constituted under the Local Government Act 1993;*
 - (b) *Aboriginal Councils constituted under the Community Services (Aborigines) Act 1984 and Island Councils constituted under the Community Services (Torres Strait) Act 1984 which have received devolution of full local government functional responsibilities from the State government; and*
 - (c) *The Aboriginal Co-ordinating Council constituted under the Community Services (Aborigines) Act 1984 and the Island Co-ordinating Council constituted under the Community Services (Torres Strait) Act 1984.*

14. An organisation formed only of members of the kind specified in rule 4 (i.e., local governments, who are obliged to exercise their law-making and executive roles for the good rule and government of their respective local government areas - see s.20 and s.25 of the *Local Government Act*), to pursue objects of the kind specified in rule 1 (which are clearly aimed at facilitating the more efficient and effective discharge by members of their responsibilities as local governments) is clearly an organisation established for public purposes.
15. In my view, the only argument of substance advanced on behalf of the LGAQ is the contention that, on its proper construction, s.9(1)(a)(i) of the FOI Act requires that the public purpose for the establishment of the relevant organisation be specified in the enactment which establishes the organisation.
16. It might be argued that support for that contention could be obtained from two sources. The first is my remarks in *Re English* at p.735 (paragraph 74):

74. ... I think the meaning of the phrase "public purpose" in s.9(1)(a) of the FOI Act is relatively straightforward. The word "purpose" directs attention to the objects or aims for which a body has been established as evidenced by the relevant powers, functions or duties conferred on it by Parliament. The word "public" imposes a requirement that a purpose be one for the benefit of members of the community generally (or a substantial segment of them, ...).

17. The second source is the remarks by Derrington J of the Supreme Court of Queensland in *Queensland Law Society Inc v Albietz* (1996) 2 Qd R 580 at p.581:

In conformity with the terms of the above definition [i.e., s.9(1)(a)(i) of the FOI Act] it is necessary to refer to the enactment in order to consider whether the purpose behind its establishment of the [QLS] in its present form and with its present functions was a public one within the meaning of the definition.

18. These remarks, however, were made in the context of a case in which the enactment that established the QLS also prescribed its powers, functions and duties, and it was logical to examine those to determine whether the organisation was established for a public purpose. In the ordinary case, an enactment which establishes a body will also prescribe its functions and powers. However, in the unusual case where that has not occurred, I do not consider that the above passages can properly be treated as laying down a rule that a body is not a public authority if a public purpose for its establishment is not specified in the enactment which established the body. Such a situation was not in the contemplation of the authors of the passages set out above.
19. 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.
20. 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, tell in favour of 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* (1992) 36 FCR 111 at p.115. Derrington J espoused a similar view in *Queensland Law Society Inc v Albiez* 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 [QLS].

21. It is consistent with the objects of the FOI Act that a body established by 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 which established the body.
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 am satisfied that the LGAQ is a public authority within the terms of s.9(1)(a)(i) of the FOI Act because it is established by an enactment, and it is established for a public purpose.
24. Even on the assumption (contrary to my finding) that the construction of s.9(1)(a)(i) urged by the LGAQ is correct, I consider that sufficient indications can be gleaned from relevant provisions of the *Local Government Act* relating to the establishment of the LGAQ to satisfy any requirement that the fact that a body is established for a public purpose should be apparent from an examination of the enactment by which the body is established.
25. While s.1194(3) of the *Local Government Act* expressly contemplates that the LGAQ will have objects and functions to perform, it is true that these are not spelled out in the *Local Government Act*. In my view, this was because s.1194 of the *Local Government Act* established a new legal entity out of an existing organisation, which had an existing Constitution and Rules that made clear its objects/purposes. Section 1195 of the *Local Government Act* gives the LGAQ power to make rules (subject to approval by the Governor in Council) with respect to all matters necessary or convenient for the management of the association, and for payment of annual subscriptions and levies. As originally enacted, the *Local Government Act 1993* contained a transitional provision (s.799 - which has been omitted in subsequent reprints of the *Local Government Act*) in the following terms:

799. *The rules of the Local Government Association in force immediately before the commencement day are taken to have been made, and approved by the Governor in Council, under this Act on that day.*

26. As noted above, those rules of the LGAQ demonstrate that it is a body established for public purposes. The rules of the LGAQ answer the description of a "statutory instrument", as defined in s.7 of the *Statutory Instruments Act 1992* Qld. Section 7 of the FOI Act provides that, in the FOI Act, "enactment" means an Act or a statutory instrument. Thus, the word "enactment" in the phrase "established for a public purpose by an enactment" in s.9(1)(a)(i) of the FOI Act can be read as encompassing both an Act of Parliament and a statutory instrument, and (relevantly for present purposes) as extending to the relevant provisions of both the *Local Government Act*, and

the rules of the LGAQ as a statutory instrument made under the *Local Government Act*. Further support for that approach is afforded by s.7(1) of the *Acts Interpretation Act 1954* Qld which provides:

In an Act, a reference (either generally or specifically) to a law (including the Act), or a provision of a law (including the Act), includes a reference to the statutory instruments made or in force under the law or provision.

27. I therefore consider that it is appropriate to look at the relevant provisions of both the *Local Government Act*, and the rules of the LGAQ that came into force on the commencement of the *Local Government Act* (in accordance with s.799 of that Act - set out above), in deciding whether a public purpose for the establishment of the LGAQ can be identified in the establishing enactment. The objects set out in the rules of the LGAQ satisfy me that the LGAQ is established for a public purpose by an enactment.
28. Even without resort to the rules of the LGAQ, there is sufficient indication in the language of the provisions contained in Chapter 18, Part 1 of the *Local Government Act* that the LGAQ is established for public purposes. The language of s.1195(1)(b) confirms what is implicit in the name "Local Government Association", i.e., that the members of the association are to be local governments. As McHugh JA remarked in *Attorney-General (UK) v Heinemann Publishers Pty Ltd* (1987) 10 NSWLR 86 at p.191: "*But governments act, or at all events are constitutionally required to act, in the public interest.*" An association of local governments is, in my view, bound to pursue objects and functions ultimately aimed at benefiting the citizens and ratepayers whose interests local governments have been created to serve (and the objects of the LGAQ, reproduced above, confirm this). I note also that one power of the LGAQ expressly dealt with in s.1196 of the *Local Government Act* (to obtain contributions towards, and disburse funding for, the expenses of litigation for matters of common interest to local governments) is consistent with the LGAQ being established for public purposes.
29. I reject the LGAQ's submission that it is a private entity with private purposes. Its members, which it was established to represent, comprise bodies exercising purely governmental functions. Such bodies themselves have no private functions - they are funded by public monies to discharge public functions on behalf of the community. In assisting its members to discharge their local government functions more efficiently and effectively, for the benefit of the communities which they serve (which, in simple terms, is what the LGAQ was established to do), the LGAQ must itself be considered to have been established for public purposes - an extension of the public purposes for which local governments were established.
30. The LGAQ has submitted that the following factors are of relevance in determining whether or not the LGAQ is properly to be characterised as a public authority for the purposes of the FOI Act:
 - The LGAQ has no legal power to affect the rights or interests of the public, unlike most other public authorities.
 - Only members of the LGAQ can give the LGAQ direction - Parliament cannot "impose its will" on the LGAQ (except in the context of requiring the approval of the LGAQ's Rules by the Governor in Council).
 - The LGAQ is to be distinguished from the QLS (and therefore from my findings in *Re English*, which decision was upheld by the Supreme Court in *Queensland Law Society Incorporated v Albietz*) because membership of the QLS is mandatory for solicitors, whereas membership of the LGAQ is voluntary.

- The public functions which made the QLS "susceptible" to the FOI Act were functions such as the regulation and discipline of the profession, which were to be considered to be for the public benefit. The LGAQ has no such functions. The types of functions of the QLS which were considered to be private, i.e., acting as a representative body, providing advice and assistance to members *et cetera*, are the same type of functions as are conducted by the LGAQ.
31. To the extent that any of these are relevant considerations, none is determinative of the issue in favour of the LGAQ. If it be correct that the LGAQ has no legal power to directly affect the rights or interests of the public, I do not regard that as significant in terms of the issue to be determined. The activities of the LGAQ (for example, its insurance services, and contract and purchasing services, for member Councils, and its assistance to member Councils with policy development, and policy and program implementation) impact on the public through the operations of member Councils.
 32. Comparisons between the LGAQ and the QLS are not helpful. Save that I am satisfied that both "perform functions within the province of government which have a public nature" (per Derrington J at p.584 of *Queensland Law Society Incorporated v Albietz*), the two organisations (as the LGAQ's submission acknowledges) function in completely different ways. The QLS has some public functions and some private functions, but I decided in *Re English* that the major purpose for which the QLS was established was a public purpose. While the QLS's members are private persons with some private interests which the QLS acts to promote, the LGAQ has no private members with private interests but exists solely to represent the interests of local government in Queensland. The LGAQ's assertion that membership of the QLS is mandatory is not correct (although obtaining a practising certificate from the QLS is mandatory for practise as a solicitor). In any event, I cannot see how the issue of whether membership of a body is voluntary or compulsory has any significance for the question of whether or not a body is established for a public purpose.
 33. The characterisation of a body as a public authority within the terms of s.9(1)(a)(i) depends upon whether it is established by an enactment, and is established for a public purpose or public purposes.
 34. I find that the LGAQ is a "public authority" within the meaning of s.9(1)(a)(i) of the FOI Act, and is therefore an agency to which applications may be made under Part 2 (regarding publication of Statements of Affairs and policy documents), Part 3 (access to documents), or Part 4 (amendment of information), of the FOI Act.

Conclusion

35. For the foregoing reasons, I find that:
 - (a) the LGAQ is an agency subject to the application of the FOI Act, because it is a body that is established for a public purpose by an enactment within the terms of s.9(1)(a)(i) of the FOI Act;
 - (b) in his letter dated 11 February 2000, the applicant made a valid application for access to documents under s.25 of the FOI Act;
 - (c) the LGAQ 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 I have jurisdiction to investigate and review the LGAQ's refusal of access.
36. I will write to the LGAQ 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 the LGAQ claims to be entitled, under the exemption provisions contained in the FOI Act, to refuse the applicant access.

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F N ALBIETZ
INFORMATION COMMISSIONER