

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96018
Application S 130/94

Participants:

PETER J McPHILLIMY
Applicant

GOLD COAST MOTOR EVENTS CO
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - jurisdiction of Information Commissioner - whether the respondent is an agency subject to the *Freedom of Information Act 1992 Qld* - whether the respondent is a "public authority" within the meaning of s.9 of the *Freedom of Information Act 1992 Qld* - whether the respondent is subject to the *Freedom of Information Act 1992 Qld* by virtue of s.8(2) of that Act - words and phrases: "established", "office".

Freedom of Information Act 1992 Qld s.8(1), s.8(2), s.8(2)(a), s.8(2)(b), s.9, s.9(1)(a)(i), s.9(1)(a)(ii), s.9(1)(b), s.9(1)(c), s.9(1)(c)(i)(A), s.9(1)(c)(ii), s.9(1)(d), s.9(1)(e), s.9(2), s.9(3), s.11(1)(n), s.11(1)(q), s.61

Freedom of Information Regulation 1992 Qld s.5(f)

Acts Interpretation Act 1954 Qld s.36

Indy Car Grand Prix Act 1990 Qld s.2.1, s.3.1, s.3.2, s.3.3, s.3.4, s.3.5, s.3.6, s.3.8, s.3.9, s.4.3, s.4.4, s.4.5

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

English and Queensland Law Society Inc, Re (Information Commissioner Qld, Decision No. 95022, 4 August 1995, unreported)

Queensland Law Society Inc v F N Albietz & Ors (Sup Ct Qld, Nos. 638/95 and 658/95, Derrington J, 1 March 1996, unreported)

Sykes v Cleary (No. 2) (1992) 176 CLR 77

Williams and Marks, Re (Commonwealth AAT, No. V96/384, 28 August 1996, unreported)

DECISION

1. I decide that the respondent is not a body subject to the *Freedom of Information Act 1992 Qld*, and hence the respondent was entitled to refuse to deal with the applicant's application dated 16 June 1994 for access to documents under the *Freedom of Information Act 1992 Qld*.
2. In accordance with s.77 of the *Freedom of Information Act 1992 Qld*, I therefore decide not to review, or not to review further, the decision of the respondent which is the subject of the applicant's application for review dated 26 August 1994.

Date of decision: 31 October 1996

.....
F N ALBIETZ
INFORMATION COMMISSIONER

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GOLD COAST MOTOR EVENTS CO
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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse his application for access to documents under the *Freedom of Information Act 1992* Qld (the FOI Act) on the basis that the respondent is not an agency subject to the FOI Act, or, alternatively, that (by virtue of s.11(1)(n) of the FOI Act) it is not subject to the FOI Act in respect of the type of documents to which the applicant requested access.
2. Mr McPhillimy is the principal of a company that provides security services (Security Promotions Australia Pty Ltd) trading as Secpro International. The Gold Coast Motor Events Co (the GCMEC) has been the promoter appointed by the Governor in Council, pursuant to s.2.1 of the *Indy Car Grand Prix Act 1990* Qld, to stage and promote Indy Car Grand Prix events at the Gold Coast in the period 1992 to 1996.
3. Mr McPhillimy has been involved in litigation with the GCMEC over the decision by the GCMEC to terminate a contract with Secpro International for the provision of security services for the 1992 Indy Car Grand Prix event. Mr McPhillimy forwarded a letter dated 16 June 1994 to the Chief Executive Officer of the GCMEC, seeking access under the FOI Act to 11 categories of documents relating to his company's dispute with the GCMEC.
4. By letter dated 28 June 1994, the Chief Executive Officer of the GCMEC replied to Mr McPhillimy in the following terms:

I refer you to section 11 of the Freedom of Information Act which provides that:

(1) This Act does not apply to -

...

- (n) Queensland Treasury Holdings Pty Ltd, its wholly owned subsidiaries (within the meaning of the Corporations Law), and the entities in which the subsidiaries have a controlling interest (within the meaning of the Corporations Law), in relation to their commercially competitive activities.

As you are aware, Gold Coast Motor Events Co, is a partnership of the following six (6) companies:

1. *Papandrea Pty Ltd ACN 011 028 596*
2. *Truffle Pty Ltd ACN 011 011 368*
3. *Igli Holdings Pty Ltd ACN 004 014 233*
4. *Southcoast Tyre Services Pty Ltd ACN 009 795 126*
5. *Raxmont Pty Ltd ACN 011 053 044*
6. *Gold Coast Events Co Pty Ltd ACN 010 949 649*

Each of the abovementioned six (6) companies is a wholly owned subsidiary of Queensland Treasury Holdings Pty Ltd.

Accordingly, we cannot accommodate your request. ...

(I note, at this stage, that the statement that "each of the ... six companies is a wholly owned subsidiary of Queensland Treasury Holdings Pty Ltd", was factually incorrect at the time it was made: see paragraph 13 below.)

5. By letter dated 26 August 1994, Mr McPhillimy asked me to determine whether or not the GCMEC was obliged to give him access, under the FOI Act, to the documents he had requested. In his letter to me, Mr McPhillimy said:

I would like to point out that it is my belief that many Government Departments are linked to the Gold Coast Motor Events Corporation such as Treasury, Consumer Affairs and The Queensland Tourist and Travel Corporation, and as you are probably aware the people of Queensland funded the Gold Coast Motor Events Corporation to an estimated \$75,000,000 as shown in the Queensland Treasury Report of 1993.

It is my belief, after 2½ years of investigations of the Gold Coast Motor Events Corporation, that it is very closely linked to the Government. I believe that it should therefore come under the Freedom of Information Act 1992.

Jurisdiction of the Information Commissioner

6. This case raises a jurisdictional issue similar to those considered in *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1 and *Re English and Queensland Law Society Inc* (Information Commissioner Qld, Decision No. 95022, 4 August

1995, unreported). For the reasons given in *Re Christie* at pp.4-6 (paragraphs 7-13) and in *Re English* at paragraphs 11-12, if I am satisfied that the GCMEC is not an agency subject to the FOI Act, or that it is not subject to the FOI Act in respect of the documents to which Mr McPhillimy has applied for access, then it follows that the GCMEC was entitled to decline to deal with Mr McPhillimy's FOI access application, and I have no jurisdiction to deal further with Mr McPhillimy's application for review. If, however, I am satisfied that the GCMEC is an agency or body which is subject to the FOI Act (or subject to it in respect of the documents to which Mr McPhillimy has requested access under the FOI Act), I may proceed with a review under Part 5 of the FOI Act to determine those documents of the GCMEC to which Mr McPhillimy has a right to be given access. It is clear that I have both the power, and a duty, to determine this preliminary jurisdictional question: see *Re Christie* at pp.5-6; paragraphs 8-13.

External review process/relevant provisions of the FOI Act

7. The review has proceeded by way of a series of written submissions by the participants, too numerous to warrant listing here. Some were prompted by my requests for clarification of factual inaccuracies in earlier submissions. Those factual inaccuracies had prompted me to undertake my own research, from various public sources of information, in order to establish relevant jurisdictional facts (which the applicant and the respondent were then invited to comment upon). In addition, I have arranged for the respondent to produce to me, for inspection and return, several commercially sensitive documents (which could not be disclosed to the applicant) - principally contracts granting, and assigning, exclusive rights to stage and promote Indy Car Grand Prix events at the Gold Coast. This has enabled me to verify certain material facts which affect the jurisdictional issue I have to determine.
8. The GCMEC initially maintained its reliance upon s.11(1)(n) of the FOI Act (but has since abandoned it: see paragraph 13 below), while also arguing that the GCMEC is not an "agency" within the meaning of that term in the FOI Act, and hence was entitled to refuse to deal with Mr McPhillimy's FOI access application dated 16 June 1994.
9. Section 8 of the FOI Act defines "agency" as follows:

8.(1) In this Act—

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

(2) In this Act, a reference to an agency includes a reference to a body that—

(a) forms part of the agency; or

(b) exists mainly for the purpose of enabling the agency to perform its functions.

10. Clearly, the GCMEC is not a department or local authority, within the meaning of s.8(1), and this was not contested by Mr McPhillimy. The meaning of "public authority", for the purposes of the FOI Act, is defined in s.9 of the FOI Act:

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*
 - (ii) *is established by government for a public purpose under an enactment; or*
- (b) *a body (whether or not incorporated) that is created by the Governor in Council or a Minister; or*
- (c) *another body (whether or not incorporated)—*
 - (i) *that is—*
 - (A) *supported directly or indirectly by government funds or other assistance or over which government is in a position to exercise control; or*
 - (B) *a body established by or under an enactment; and*
 - (ii) *that is declared by regulation to be a public authority for the purposes of this Act; or*
- (d) *subject to subsection (3), a person holding an office established by or under an enactment; or*
- (e) *a person holding an appointment—*
 - (i) *made by the Governor in Council or Minister otherwise than by or under an enactment; and*
 - (ii) *that is declared by regulation to be an appointment the holder of which is a public authority for the purposes of this Act;*

but does not include a body that, under subsection (2), is not a public authority for the purposes of this Act.

(2) *For the purposes of this Act, an unincorporated body that is a board, council, committee, subcommittee or other body established by or under an enactment for the purpose of assisting, or performing functions connected with, a public authority is not a separate public authority, but is taken to be comprised within the public authority.*

(3) *A person is not a public authority merely because the person holds—*

- (a) *an office the duties of which are performed as duties of employment as an agency's officer; or*
- (b) *an office of member of a body; or*
- (c) *an office established by or under an enactment for the purposes of an agency.*

11. Mr McPhillimy has asserted in his submissions that the GCMEC satisfied each of the following paragraphs of the definition of "public authority" in s.9 of the FOI Act: s.9(1)(a)(i) and (ii), s.9(1)(b), s.9(1)(c), and s.9(1)(d). Mr McPhillimy also asserted that the GCMEC falls within s.8(2) of the FOI Act.
12. I will deal first with the application of s.9, which, if it applies to the GCMEC, means that the GCMEC is an agency in its own right. If the GCMEC does not fall within the terms of s.9, I will then deal with s.8(2). The application of s.8(2) turns on finding a body which is clearly an agency in its own right, and then determining whether a body (which is not an agency) has a relationship to an agency which falls within the terms of s.8(2)(a) or (b).
13. The task is one of applying the language of s.8 and s.9 of the FOI Act to the material facts, and, in this regard, the factual position with respect to the establishment and continued existence of the GCMEC has proved to be somewhat unusual and convoluted. Indeed, it has become apparent during the course of my review that, at various times, neither the respondent's Chief Executive, nor the respondent's solicitors, correctly understood the relevant factual position. Incorrect factual statements were made by the Chief Executive of the respondent in his initial response to Mr McPhillimy's FOI access application (see paragraph 4 above: the application of s.11(1)(n) of the FOI Act was incorrectly claimed, because, at the time of that response, the companies comprising the GCMEC partnership were no longer wholly owned subsidiaries of Queensland Treasury Holdings Pty Ltd, but were companies wholly owned by nominees, in trust for the Department of Tourism, Sport and Racing). Several incorrect factual statements have also been made in written submissions lodged with me by the respondent's solicitor. Delays have occurred when I have found it necessary to undertake my own research to verify the correct factual position, and put it to the respondent for confirmation. By the end of the review, however, I was satisfied that, with the assistance of the respondent's solicitors (and information obtained from the Annual Reports published in respect of the various bodies mentioned in the chronology below), I have been able to establish the material facts, which are best recorded in the form of the following chronology:-

22 May 1990

A 'promoter agreement' was concluded between the American corporation, Championship Auto Racing Teams Inc (CART), which owns the rights to stage Indy Car races throughout the world, and Queensland Events Corporation Pty Ltd (a company then wholly controlled by Queensland Treasury Corporation) giving Queensland Events Corporation Pty Ltd the exclusive rights to stage and promote an annual Indy Car Grand Prix event on the Gold Coast, for a period of five years.

- 10 August 1990 A partnership agreement was signed establishing a partnership between six companies operating under the registered business name, Gold Coast Indy Car Grand Prix Co. The companies forming this partnership were Gold Coast Events Co Pty Ltd (then a subsidiary company of Queensland Events Corporation Pty Ltd), which had a 50 per cent equity interest and a voting entitlement of 51 per cent, and five other companies representing individual investors who had actively sought the right to stage and promote Indy Car events in Queensland -
- Southcoast Tyre Services Pty Ltd (established 12 November 1969)
 - Truffle Pty Ltd (established 22 January 1990)
 - Papandrea Pty Ltd (established 21 March 1990)
 - Igli Holdings Pty Ltd (established 18 June 1990)
 - Raxmont Pty Ltd (established 26 June 1990).
- 10 August 1990 Queensland Events Corporation Pty Ltd assigned its rights under the promoter agreement with CART to the partnership operating under the business name Gold Coast Indy Car Grand Prix Co.
- 18 September 1990 The *Indy Car Grand Prix Act 1990* Qld came into force.
- 25 October 1990 The partnership operating under the business name Gold Coast Indy Car Grand Prix Co was declared, under s.2.1 of the *Indy Car Grand Prix Act 1990* Qld, to be the promoter of the 1991 Indy Car Grand Prix event.
- March 1991 The first Gold Coast Indy Car Grand Prix event was staged.
- May 1991 Pursuant to options (to sell their interests in the partnership to Gold Coast Events Co Pty Ltd) exercised by the private partners under the partnership agreement, Gold Coast Events Co Pty Ltd acquired all shares in the other five partner companies. Subsequently, the shares in Gold Coast Events Co Pty Ltd were purchased from Queensland Events Corporation Pty Ltd by the Queensland Treasury Corporation. A new Board of Management for the partnership was established to continue the promotion and staging of future Gold Coast Indy Car Grand Prix events.
- 19 August 1991 The partnership commenced to operate under a new business name Gold Coast Motor Events Co.
- 19 December 1991 The partnership operating under the business name Gold Coast Motor Events Co (GCMEC) was declared under s.2.1 of the *Indy Car Grand Prix Act 1990* to be the promoter for the years 1992, 1993, 1994 and 1995.
- 30 June 1992 The shares in Gold Coast Events Co Pty Ltd were purchased from the Queensland Treasury Corporation by Queensland Treasury Holdings Pty Ltd.

- 9 December 1993 Ownership of the shares in Gold Coast Events Co Pty Ltd (which in turn owned the other five companies in the GCMEC partnership) was transferred from Queensland Treasury Holdings Pty Ltd to two senior officers of the Department of Tourism, Sport and Racing, as trustees on behalf of the Department of Tourism, Sport and Racing.
- 16 June 1994 Mr McPhillimy lodged his FOI access application with the GCMEC.
- 28 June 1994 The Chief Executive Officer of the GCMEC responded to Mr McPhillimy's FOI access application (the text of the response is set out at paragraph 4 above).
- 18 May 1995 By amendment, s.5(f) was added to the *Freedom of Information Regulation 1992* Qld, prescribing that the FOI Act does not apply to the GCMEC in respect of documents relating to its competitive commercial activities.
- 30 August 1995 A 50% interest in the GCMEC partnership was transferred to the International Management Group of America Pty Ltd (IMG).

Application of s.9 of the FOI Act to the GCMEC

14. A written submission, dated 22 September 1994, by the respondent's solicitors asserted that only paragraph (a) of the s.9(1) definition of "public authority" was even arguably relevant to the GCMEC, but that it did not apply for the following reasons:

... our client ... commenced carrying on business under the name of Gold Coast Motor Events Co on 19 August 1991. The partnership was formed for the purpose of promoting, organising and staging Indy Car Grand Prix on the Gold Coast, pursuant to rights granted to it by Championship Auto Racing Teams Inc., a United States company which is the owner of the rights in relation to Indy Car racing throughout the world. At the time, Gold Coast Events Co Pty Ltd was beneficially owned by the Queensland Government. The other five partners were privately owned by persons who had actively sought the right to stage and promote such events in Queensland. None of the partners, other than Gold Coast Events Co Pty Ltd, was "established" by Government.

... our client was established for the purpose of promoting, organising and staging a world class motor racing event on the Gold Coast every year, initially for a period of five years. That is not a public purpose. It is a commercial venture that is supported by the Government because of the significant economic and tourist benefits to the State of Queensland. In staging and promoting that event our client does not fulfil any public purpose, as that term is understood within the meaning of the [FOI] Act.

Finally, in order for a body to be a public authority within the meaning of section 9(1)(a)(ii) the body must be established "under" an enactment.

"Enactment" means an enactment of the Queensland Parliament. Our client, like any other partnership in the State of Queensland, is established in accordance with the laws of partnership in Queensland. The rights and liabilities of the partners are regulated in part by the provisions of the Queensland Partnership Act.

However, the partnership is not established under that Act. It is established pursuant to an express agreement between the partners.

Our client also has certain rights and obligations as a result of being gazetted as the "Promoter" under the Indy Car Grand Prix Act. However, our client is not established under that Act. It does not obtain its legal personality as a result of the provisions of that Act.

Our client is not established "under" any enactment of the Queensland Parliament.

Therefore, our client is not a "public authority" and is not an "agency" within the meaning of the Act. The Act has no application to our client and, accordingly, you do not have any jurisdiction to investigate Mr McPhillimy's complaint.

15. By letter dated 25 October 1994, Mr McPhillimy submitted:

I do not agree that the GCMEC does not fall within the definition of an agency. I submit that section 9(1)(a)(ii) may apply to the partnership. The partnership itself is a body, made up of five companies for the public purpose of promoting the Indy Car Grand Prix, which is sold to the public of Queensland as being an event which is responsible for creating huge tourism and retail income for the good of Queensland. The relevant enactment, in my submission would be the Indy Car Grand Prix Act.

It is my submission that the public purpose is the object of paragraph 9(1)(a)(ii) and this public purpose is created by the Indy Car Grand Prix Act.

16. In my opinion, the somewhat unusual circumstances of the initial establishment of the partnership, despite its continuation under government ownership between August 1991 and August 1995, lead to the result that the GCMEC does not fall within the language of any of the paragraphs of the definition of public authority in s.9(1) of the FOI Act. I will briefly address each paragraph of s.9(1).

Section 9(1)(a)

17. The natural and ordinary meaning of the word "establish" in the context of s.9 is "to set up on a firm or permanent basis" (Macquarie Dictionary), and s.36 of the *Acts Interpretation Act 1954* Qld also relevantly provides that: "*establish*" includes constitute and continue in existence. I note, in this regard, that in *Queensland Law Society Incorporated v Albietz & Ors* (Sup Ct Qld, Nos. 638/95 and 658/95, Derrington J, 1 March 1996, unreported), when considering the application of s.9(1)(a)(i) to the Queensland Law Society Inc, Derrington J said:

The Society also correctly concedes that in the application of the definition it is appropriate to consider how it is now established, and the exercise should not be confined to the original act of establishment.

In conformity with the terms of the above definition it is necessary to refer to the enactment in order to consider whether the purpose behind its establishment of the Society in its present form and with its present functions was a public one within the meaning of the definition.

18. The GCMEC does not fall within the terms of s.9(1)(a)(i) of the FOI Act because it was not, and is not, established by an enactment. The partnership which presently trades as the GCMEC was established pursuant to the partnership agreement executed by each of the partners on 10 August 1990. I note in this regard that the *Partnership Act 1891* does not regulate the formation or establishment of partnerships, so it cannot be said that a partnership is established by, or even under, that legislation. In *Re English and Queensland Law Society Incorporated* (Information Commissioner Qld, Decision No. 95022, 4 August 1995, unreported), I said (at paragraph 69) that the word "by" in the phrase "established by an enactment" means that the establishment of whatever body is in issue "must be effected by, i.e., directly provided for in, an enactment". There is no enactment which directly provides for, or effects, the establishment of the partnership which trades as the GCMEC.
19. Mr McPhillimy's submissions sought to place reliance on the *Indy Car Grand Prix Act 1990*. However, that Act relevantly does no more than provide (in s.2.1) for the appointment of a promoter for the annual Grand Prix event. Appointment as a promoter does not amount to an act of establishment, as contemplated by s.9(1)(a) of the FOI Act. The *Indy Car Grand Prix Act 1990* does not concern itself with establishing, or continuing the existence of, the partnership now trading as the GCMEC. The legal constitution of the partnership was not effected (nor affected) by its appointment as promoter under the *Indy Car Grand Prix Act 1990*.
20. Turning to s.9(1)(a)(ii) of the FOI Act, it cannot, in my opinion, be correctly said that the partnership which presently trades as the GCMEC was initially established by government. The partnership was established by agreement of the respective partners, five of which were private companies representing individual investors.
21. However, if the word "established" is also to be considered in the sense of "continued in existence", I consider that from the point in time when Gold Coast Events Co Pty Ltd acquired ownership of the other five companies comprising the partnership (ceding total beneficial ownership to the Queensland government) it must be said that the partnership was continued in existence by government. That was the position at the time Mr McPhillimy lodged his FOI access application, and seems to have prevailed at least until 30 August 1995. (The position thereafter is not entirely clear, as the Queensland government appears to have ceded management responsibility for the operations of the partnership to IMG, while maintaining a 50% interest in the partnership: see the 1994/95 Annual Report of the Department of Tourism, Sport and Racing at p.12).
22. Nor, in my opinion, is there any doubt that from the time that Gold Coast Events Co Pty Ltd acquired the other companies comprising the partnership, that the partnership was continued in existence by government for a public purpose. The phrase "a public purpose" is apt to include a purpose that is for the benefit of members of the community generally, or a substantial segment of them. In the 1992/93 Annual Report of Queensland Treasury Holdings Pty Ltd, it was stated (at p.7) that:

The principal objectives of [the partnership trading as] Gold Coast Motor Events Co are:

- *To successfully stage an international-standard motor racing event in South-East Queensland.*
- *To use this event as a means of promoting the Gold Coast and South-East Queensland within Australia and internationally.*

- *To achieve the maximum economic benefit to the South-East Queensland economy for a minimum annual investment by the State Government.*

...

The initial three years of the event have demonstrated a capacity to generate substantial benefits to South-East Queensland and the State as a whole. It is recognised as a cost-effective promotional tool with benefits to tourism and Queensland extending far beyond the week of Indy-related activities on the race circuit and elsewhere.

As well as the immediate boost to the economy, there are the longer-term benefits to be derived from worldwide promotion through all media.

23. The purpose of successfully staging an international-standard motor racing event has no inherently governmental or public character. It is capable of being pursued solely for the purpose of generating profits. However, the second and third purposes stated in the passage quoted above are, in my opinion, clearly of a traditional governmental or public character, i.e., the expenditure of public funds to stimulate or subsidise desirable private sector economic activity. Where a body which is wholly beneficially owned by government (as the GCMEC clearly was between 19 August 1991 and 30 August 1995) expends substantial sums of public money (advanced by way of grant from the Queensland government) in meeting losses incurred in the staging of a motor racing event, in order to achieve the second and third purposes stated in the passage quoted above, I consider that it must properly be characterised as a body which exists for a public purpose.
24. I note that there was no change in this regard after ownership of the GCMEC was transferred on 9 December 1993 from Queensland Treasury Holdings Pty Ltd to the Department of Tourism, Sport and Racing. The 1993/94 Annual Report of the Department of Tourism, Sport and Racing stated (at pp.9-10):

The Tourism Program [of which one of the stated goals was "to generate a substantial economic activity and to raise the profile of the state through the staging of events"] is a joint undertaking by the Department, Queensland Tourist and Travel Corporation (QTTC), Queensland Events Corporation (QEC) and the Gold Coast Motor Events Co. The goals for the Tourism Program reflect the goals of all these partners in the development and management of tourism and tourism policy. ...

...

- *A record number of people attended the 1994 Australian Indy Car Grand Prix at the Gold Coast in March. \$23m in direct benefits and \$15m in promotional value was generated by the 1994 Indy Car event (source: Ernst and Young).*

25. However, notwithstanding my view that, after 19 August 1991, the GCMEC was a body established (in the sense of continued in existence) by government for a public purpose, I consider that the words "under an enactment" add a further element to the test of whether a body is a public authority under s.9(1)(a)(ii), being an element which the GCMEC does not satisfy. The words "under an enactment" must, in the context of s.9(1)(a)(ii), qualify either the

word "established" or the words "public purpose". I need not express a concluded opinion on that issue, since I consider that the test that would be posed by either construction is not satisfied in the case of the GCMEC. As I have already indicated (see paragraphs 18-19 above) no enactment can be identified under which the GCMEC can be said to have been initially established, or continued in existence. This also has the consequence that there is no enactment which can be examined for indications of a public purpose for the establishment of the GCMEC.

26. Mr McPhillimy, however, relying on the construction that the words "under an enactment" qualify the words "public purpose", has directed attention to the *Indy Car Grand Prix Act 1990* for the relevant "public purpose under an enactment".
27. Having carefully examined the *Indy Car Grand Prix Act 1990*, I am unable to accept Mr McPhillimy's contention. In my view, the *Indy Car Grand Prix Act 1990* is purely facilitative of matters necessary for the effective staging of an Indy Car event on the Gold Coast, something which, as I have said above, has no inherently governmental or public character. I am unable to find anything in the terms of the *Indy Car Grand Prix Act 1990* which, in my opinion, answers the description "a public purpose under an enactment". (I note that the *Indy Car Grand Prix Act 1990* was enacted at a time when the contractual rights to stage and promote the initial event were held by a partnership comprising government and private interests, and no doubt it was fervently hoped that the event would be run at a profit, although agreements were in place for the government to underwrite losses that occurred.)
28. For the foregoing reasons, I find that the GCMEC does not fall within the terms of either s.9(1)(a)(i) or s.9(1)(a)(ii) of the FOI Act.

Section 9(1)(b)

29. Section 9(1)(b) of the FOI Act does not apply to the GCMEC because the partnership was not created by the Governor in Council or a Minister, but by the agreement of the partners.

Section 9(1)(c)

30. The GCMEC answers the description in s.9(1)(c)(i)(A) of the FOI Act, but to be caught by the terms of s.9(1)(c), it must also (by virtue of the cumulative requirement imposed by s.9(1)(c)(ii) of the FOI Act) be a body that is declared by regulation to be a public authority for the purposes of the FOI Act. No such declaration by regulation has been made in respect of the GCMEC.

Section 9(1)(d)

31. In my opinion, s.9(1)(d) does not apply to the GCMEC, because the status of promoter under s.2.1 of the *Indy Car Grand Prix Act* is not an office of the kind contemplated by s.9(1)(d) of the FOI Act. I consider that, in s.9(1)(d), the legislature has turned its attention from bodies (whether or not incorporated), which are dealt with in s.9(1)(a), (b) and (c), to individuals who hold offices established by or under an enactment. In this regard, I think the statutory context tells against giving the word "person", in s.9(1)(d), the meaning contemplated by s.36 of the *Acts Interpretation Act 1954 Qld* (i.e., an individual and a corporation), and rather requires the word "person" to be given the restricted meaning of an individual, i.e., a natural person. The terms of s.9(3) lend support to this interpretation. The word "office" involves the notion of a position of paid employment to which specified duties are attached (see *Sykes v Cleary* (No. 2)

(1992) 176 CLR 77 at p.95 (per Mason CJ, Toohey and McHugh JJ) and *Re Williams and Marks* (Commonwealth AAT, No. V96/384, 28 August 1996, unreported, per Senior Member Bayne at paragraphs 11-17). In my opinion, s.9(1)(d) is intended to cover individuals who hold statutory offices under provisions that are similar in nature to s.61(1) of the FOI Act, which provides: "*An office of Information Commissioner is established.*"

32. Nowhere in the *Indy Car Grand Prix Act* is "promoter" described as an office under that Act. Although the promoter may be an individual, it is a status that may be accorded to a person or group of persons, with the word "person", in the context of s.2.1 of the *Indy Car Grand Prix Act*, clearly intended to have the meaning provided for in s.36 of the *Acts Interpretation Act 1954* Qld, i.e.: "*person*" includes an individual and a corporation. Thus far, the promoter declared under s.2.1 of the *Indy Car Grand Prix Act* has been a group of corporations, in partnership. In my opinion, this is inconsistent with the status of promoter under s.2.1 of the *Indy Car Grand Prix Act* being an office of the kind contemplated by s.9(1)(d) of the FOI Act. Moreover, an analysis of the provisions of the *Indy Car Grand Prix Act* discloses that the major purposes of providing for a person or group of persons to be promoter are twofold -
- (a) to confer the promoter with certain powers in respect of public and private land (and concomitant duties to consult with affected persons, make good any damage, etc) in a declared area for a declared period, to enable the effective staging of the Grand Prix event: see sections 3.1-3.6, 3.8 and 3.9 of the *Indy Car Grand Prix Act*; and
 - (b) to confer the promoter with special rights in respect of the commercial exploitation of official Grand Prix insignia, and the broadcasting, or sound or film recording, of a Grand Prix event: see sections 4.3-4.5 of the *Indy Car Grand Prix Act*.

This has more in common with statutes granting licences or permits involving rights, powers and duties in respect of the commercial exploitation of land or other forms of property, than it does with the establishment of a statutory office of the kind which I consider is contemplated by s.9(1)(d) of the FOI Act.

Section 9(1)(e)

33. Section 9(1)(e) of the FOI Act cannot apply to the GCMEC because, leaving to one side the difficulty it has in answering the description in s.9(1)(e)(i), the cumulative requirement imposed by s.9(1)(e)(ii) is not satisfied, since no relevant declaration by regulation has been made.

Section 9(2)

34. Section 9(2) of the FOI Act does not affect the GCMEC because it applies to "an unincorporated body ... established by or under an enactment ...", and, as explained at paragraphs 18-19 above, the GCMEC was not established by or under an enactment.
35. I am therefore satisfied that the GCMEC is not a "public authority" within the meaning of s.9 of the FOI Act.

Application of s.8(2) of the FOI Act

36. Mr McPhillimy also placed reliance on s.8(2) of the FOI Act, the terms of which are set out in paragraph 9 above.
37. Section 8(2) is, in several respects, an infelicitously worded provision, and it is difficult to divine its precise purpose. There seem to me to be two possibilities. First, that s.8(2) is intended as an enlarging definition; but this would have the result of making bodies of the kind described in s.8(2)(a) and (b) subject, in their own right, to the obligations imposed on agencies by various provisions of the FOI Act (e.g., the obligation to publish certain documents and information under Part 2 of the FOI Act; the obligation to deal with applications for access to documents in accordance with Part 3 of the FOI Act; the obligation to deal with applications for amendment of information in accordance with Part 4 of the FOI Act). A few examples of bodies falling within s.8(2)(a) or (b) spring readily to mind, e.g., a state primary school or high school would be a body which forms part of the Department of Education, and indeed, which exists mainly for the purpose of enabling the Department of Education to perform its functions; a Committee established to advise the Department of Primary Industries on allocation of research grants would be a body which forms part of the Department of Primary Industries. It would, in some respects, seem an odd result if bodies of that kind were, by virtue of s.8(2), to be subjected, in their own right, to all of the obligations which apply to agencies under the FOI Act - e.g., compliance with s.18 of the FOI Act.
38. The second possibility (and, in my view, that which is more likely to have been intended) is that s.8(2) is intended to perform a similar function to s.9(2), such that obligations imposed by the FOI Act on an agency (as defined in s.8(1) of the FOI Act) are enlarged to the extent that an agency, as defined, must also discharge those obligations in respect of bodies which stand in a relationship to it of the kinds described in s.8(2)(a) and s.8(2)(b). Thus, in the first of the examples given above, the Department of Education would discharge the obligations imposed on an agency by the FOI Act on behalf of all state primary schools and high schools. A request for access, under the FOI Act, lodged with a particular school, for documents held by that school, would still have to be dealt with, but as an obligation of the Department of Education rather than the particular school in its own right.
39. The word "enabling" in s.8(2)(b) seems an unduly restrictive word to be employed in such a context. It is difficult to think of many examples of bodies which exist for the purpose of enabling an agency (in the sense of making an agency able) to perform its functions. I should have thought that a word like "assisting" would be more appropriate than "enabling" in the context of s.8(2)(b).
40. Nevertheless, according to its terms, s.8(2) operates in this fashion. It must first be determined that a person or body falls within the definition of "agency" in s.8(1) of the FOI Act, thus becoming "the agency" referred to in s.8(2)(a) and s.8(2)(b). The effect of s.8(2) then is to provide that a reference in the FOI Act to an agency includes a reference to a body that answers the descriptions in s.8(2)(a) and (b). Thus, the right of access conferred by s.21 of the FOI Act, read in the light of s.8(2), must be read as if in the following terms:

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

(a) documents of an agency [including a body that forms part of the agency or exists mainly for the purpose of enabling the agency to perform its functions];

...

41. Likewise, s.25(1) should be read as follows:

A person who wishes to obtain access to a document of an agency [including a body that forms part of the agency, or exists mainly for the purpose of enabling the agency to perform its functions] ... under this Act is entitled to apply to the agency [including a body that forms part of the agency, or exists mainly for the purpose of enabling the agency to perform its functions] ... for access to the document.

42. Thus, if there exists a body which falls within the definition of "agency" in s.8(1), and in respect of which it can be said that the GCMEC forms part of that agency, or the GCMEC exists mainly for the purpose of enabling that agency to perform its functions, then an application for access, under the FOI Act, to documents of the GCMEC must be dealt with in accordance with Part 3 of the FOI Act (even though the primary obligation to do so may fall on the agency to which the GCMEC stands in a relationship of the kind described in s.8(2)(a) or (b) of the FOI Act).
43. In his written submissions, Mr McPhillimy has variously referred to Queensland Treasury Holdings Pty Ltd, Queensland Treasury Corporation, Queensland Treasury, Queensland Events Corporation Pty Ltd, Gold Coast Events Co Pty Ltd, the Department of Tourism, Sport and Racing, and the Queensland Tourist and Travel Corporation (the QTTC), as agencies to which the GCMEC may have stood in a relationship of the kind described in s.8(2)(a) or s.8(2)(b) of the FOI Act. Given the change in ownership of the GCMEC that had occurred by the date that Mr McPhillimy lodged his FOI access application with the GCMEC (16 June 1994), all but the last three of these can be eliminated as possible candidates.
44. While Gold Coast Events Co Pty Ltd formed part of the partnership trading as the GCMEC, I do not think it can logically be said that the GCMEC formed part of Gold Coast Events Co Pty Ltd. (In so saying, I do not mean to be taken as expressing a view that Gold Coast Events Co Pty Ltd is itself an "agency" as defined by s.8(1). The respondent's solicitors have contended that it is not, and in the view I have ultimately reached, that is an issue which I do not need to address). Nor, in my opinion, can it properly be said that the GCMEC formed part of the Department of Tourism, Sport and Racing, or of the QTTC (even though, after 9 December 1993, senior QTTC staff were seconded into key positions at the GCMEC, and the Chief Executive of the QTTC also became the Chief Executive of the GCMEC). Although the corporations comprising the GCMEC partnership were owned by the Department of Tourism, Sport and Racing at the time of lodgment of Mr McPhillimy's FOI access application, the corporations were separate legal entities (operating, in partnership, a clearly defined business - that of staging and promoting Gold Coast Indy Car Grand Prix events) and, in my opinion, it cannot be said that the corporations or the partnership formed part of the Department of Tourism, Sport and Racing, or formed part of the QTTC, giving the words of s.8(2)(a) their ordinary meaning.
45. Nor, in my opinion, is there any agency (as defined in s.8(1) of the FOI Act) of which it can be said, in the terms of s.8(2)(b) of the FOI Act, that the GCMEC exists mainly for the purpose of enabling the agency to perform its functions. It must be remembered that the partnership has, at all relevant times, been the holder of the exclusive contractual rights, granted by CART, to stage and promote Gold Coast Indy Car Grand Prix events. The partnership has also been the designated promoter entitled to the benefit of the facilitative provisions in the *Indy Car Grand Prix Act 1990*. Thus, the GCMEC has always had its own clearly defined functions to perform,

and cannot, in my opinion, be properly described as a body which exists mainly for the purpose of enabling another body to perform its functions.

46. I therefore find that the GCMEC is not a body which is subject to the FOI Act by virtue of s.8(2) of the FOI Act.

Conclusion

47. For the foregoing reasons, I find that the GCMEC is not a body which is subject to the obligations imposed on agencies by the FOI Act, and it was therefore entitled to refuse to deal with Mr McPhillimy's letter dated 16 June 1994 seeking access to documents under the FOI Act.
48. This does not mean that documents created by, or concerning, the GCMEC can never be subject to the FOI Act. Any such documents in the possession or control of an agency which falls within the definition in s.8(1) of the FOI Act, will be subject to the FOI Act, as is the case with documents created by, or concerning, any private sector corporation or private citizen which find their way into the possession or control of an agency which is subject to the FOI Act. (Thus, in *Re McPhillimy and Queensland Treasury* (Information Commissioner Qld, Decision No. 96011, 28 June 1996, unreported), documents of the GCMEC, copies of which were in the possession of Queensland Treasury, were subject to the FOI Act through an access application made to Queensland Treasury.)
49. I note that on 18 May 1995, the *Freedom of Information Regulation 1992* was amended, *inter alia*, by the insertion of s.5(f) which has the effect of prescribing the GCMEC, in relation to its competitive commercial activities, for the purposes of s.11(1)(q) of the FOI Act. Section 11(1)(q) provides:

11.(1) This Act does not apply to—

...

(q) an agency, part of an agency or function of an agency prescribed by regulation for the purposes of this paragraph.

50. The amendment to the *Freedom of Information Regulation 1992*, which inserted s.5(f), must have proceeded on the assumption that the GCMEC was an agency for the purposes of the FOI Act. It is not surprising that such an assumption should be made, given the GCMEC's relationship to government. However, the assumption was, in my opinion, mistaken. Due to the somewhat unusual circumstances of its establishment, and given the application of the language used in s.8 and s.9 of the FOI Act to those circumstances, the GCMEC falls outside the range of bodies subject to the obligations imposed by the FOI Act.
51. This is, in many respects, an anomalous result (see my findings at paragraphs 21-24 above) and I consider that, for so long as the operations of the GCMEC are subsidised by public funds, it ought, in principle, to be a body which is accountable to the public by being subject to the obligations imposed on agencies by the FOI Act. This could be achieved by the making of a regulation under s.9(1)(c)(ii) of the FOI Act, declaring the GCMEC to be a public authority for the purposes of the FOI Act. Section 5(f) of the *Freedom of Information Regulation 1992* would then still have effect, according to its tenor.

Decision

52. Having investigated the jurisdictional issue posed in paragraph 6 above, I am satisfied that I do not have jurisdiction to deal with Mr McPhillimy's application for review dated 26 August 1994, because the GCMEC is not a body which is subject to the FOI Act, and hence was entitled to refuse to deal with Mr McPhillimy's application for access to documents under the FOI Act. In accordance with s.77 of the FOI Act, I therefore decide not to review, or not to review further, the decision of the GCMEC which is the subject of Mr McPhillimy's application for review dated 26 August 1994.

.....
F N ALBIETZ
INFORMATION COMMISSIONER