

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Application 134/06

Participants:

MR SHANE BARKER

Applicant

THE EXECUTIVE RESOURCE GROUP PTY LTD

Respondent

DECISION AND REASONS FOR DECISION

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REASONS FOR DECISION

1. Background

- 1.1 This review was commenced by an application for external review of a deemed refusal of access by The Executive Resource Group Pty Ltd (the ER Group) to documents requested by the applicant in an access application under Part 3 of the *Freedom of Information Act 1992* Qld (the FOI Act). The first issue for determination, however, is whether the ER Group is an 'agency' for the purposes of the FOI Act, and therefore subject to its provisions. If the ER Group is not an agency, then the applicant was not entitled to apply to it, under the FOI Act, for access to documents, and the Information Commissioner will have no jurisdiction to review a refusal of access by the ER Group – whether express or deemed – to give the applicant access to the requested documents.
- 1.2 The ER Group is an Australian proprietary company (ACN 092 260 949), limited by shares. It provides executive and professional recruitment, human resources and management services to its clients on a commercial basis. One of its clients is Queensland Rail (QR), which periodically retains the ER Group to provide services in connection with QR's recruitment and selection processes.
- 1.3 In October 2005 QR advertised the position of Senior Adviser Disaster Management. The ER Group was retained to conduct the recruitment and selection process. The applicant applied for and was offered the position in November 2005, but QR then withdrew the offer of employment as the nature of the position was to be altered. I understand that there was a review of the emergency management requirements of QR, following certain events in November 2005, and that QR subsequently appointed a person other than the applicant as its Senior Training Advisor.
- 1.4 The applicant alleges that the offer of employment was withdrawn by QR after it obtained access to certain information about him (which I note was publicly available information), and made further contact with his referees to discuss that information. The applicant contends that in performing additional background checks QR and the ER Group had committed serious breaches of his privacy and were "*in contravention of a number of procedures, provisions of Acts and regulations*".
- 1.5 By letter dated 14 December 2005 the applicant applied to the ER Group for access, under the FOI Act, to the following documents:
 1. *Copies of all and any information/correspondence/material/documents relative to my application for the position of Senior Adviser Disaster Management and Senior Training Advisor with Q Rail.*
 2. *Copies of all and any electronic or hard copy correspondence/documents/material/information of any nature regarding this process or myself and any employee of Q Rail, or any other party where relevant.*
- 1.6 Having received no acknowledgment of his application, the applicant again wrote to the ER Group on 10 January 2006 requesting a response. By letter dated 13 January 2006, the ER Group informed the applicant that it was "*seeking advice on this matter and therefore not in a position to respond, in any form, until this is received*". Having received no further correspondence in this regard, nor any response to a subsequent letter dated 12 February 2006 to the ER Group, the applicant applied to the Information Commissioner, by way of a letter dated 12 March 2006, for review under Part 5 of the FOI Act of the ER Group's deemed refusal of access to the requested documents.

2. Steps taken in the external review process

- 2.1 Information Commissioner Albietz found, in *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), that the Information Commissioner has both the power, and a duty, to consider and determine issues relating to the limits of the Commissioner's jurisdiction, when they are raised as an issue in an application for external review.
- 2.2 Upon receipt of this application, therefore, I made preliminary inquiries, pursuant to s.75 of the FOI Act, with QR and the ER Group for the purpose of determining whether or not the Information Commissioner had jurisdiction to deal with this application. As a result of those inquiries I formed the preliminary view that the ER Group does not fall within any of the categories of 'public authority' set out in s.9 of the FOI Act and, accordingly, is not an agency for the purposes of the FOI Act.
- 2.3 By letter dated 22 March 2006 I informed the applicant and the ER Group of my preliminary view that the ER Group is not an agency for the purposes of the FOI Act. I also requested the ER Group to provide confirmation of its advice to the applicant that it is a private sector entity which is retained from time to time by QR on a commercial basis.
- 2.4 By letter dated 28 March 2006 the ER Group provided confirmation of its relationship with QR and of its statement to the applicant that it was not subject to the provisions of the FOI Act. The applicant lodged a submission dated 9 April 2006, in which he advised that he contested my preliminary view and provided arguments in support of his case that documents in the possession of the ER Group should be accessible under the FOI Act.
- 2.5 In making my decision as to whether the Information Commissioner has jurisdiction to review this matter, I have taken into account the following material:
 - the applicant's FOI access application dated 14 December 2005 and application for external review dated 12 March 2006;
 - information obtained from the ER Group's website (www.ergroup.com.au);
 - the letter dated 28 March 2006 from the ER Group; and
 - the applicant's submission dated 9 April 2006.

3. What is an 'agency' for the purposes of the FOI Act

- 3.1 Section 21 of the FOI Act provides:

21 *Right of access*

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

- (a) documents of an agency; and*
- (b) official documents of a Minister.*

- 3.2 If the ER Group is an agency, it will be subject to the obligations imposed on agencies by the FOI Act and, pursuant to s.21, the applicant will have a legally enforceable right of access to documents in the possession of the ER Group (subject to the provisions of the FOI Act itself, including the exemption provisions contained in Part 3, Division 2).

3.3 An agency is defined in s.8 of the FOI Act as

8 Meaning of agency

(1) *In this Act—*

agency means a department, local authority or public authority.

3.4 As the ER Group is self-evidently neither a department nor a local authority, the issue for determination is whether or not it is a 'public authority', which is defined in s.9(1) of the FOI Act. If the ER Group does not fall within the definition of public authority, it will not be subject to the application of the FOI Act and the applicant would have had no right to apply to it under the Act for access to documents. In the event of such a finding, I will have no jurisdiction to deal further with the applicant's request for external review.

3.5 Section 9 of the FOI Act provides:

9 Meaning of public authority

(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, whether or not the public purpose is stated in the 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.*

Application of s.9 of the FOI Act to the ER Group

- 3.6 I am satisfied that ss.9(1)(b) and 9(1)(c) of the FOI Act have no application in this case. There is nothing before me to suggest that the ER Group was created by the Governor-in-Council or by a Minister, and the applicant has not sought to argue that it is such a body. It is clearly not a body declared by a regulation to be a public authority, as no such regulation has been made.
- 3.7 I am also satisfied that ss.9(1)(d) and s.9(1)(e) of the FOI Act do not apply to the ER Group. Those provisions apply to persons holding an office established by or under and enactment, or an appointment made by the Governor-in-Council or a Minister. Although the ER Group performed services for QR, it did so on a commercial basis and not because any person associated with it held an office or appointment of the kind mentioned in s.9(1)(e). (I note that, even if it could be argued that there had been such an appointment, there is no appointment declared by regulation to be a public authority for the purposes of the FOI Act.) Accordingly, the only section of which I need to consider the application is s.9(1)(a) of the FOI Act.
- 3.8 Section 9(1)(a)(i) requires a body to be “*established for a public purpose by an enactment*”. In *Re English*, Commissioner Albietz found (at p.69) that, in the phrase “*established by an enactment*”, the word ‘by’ means that the establishment of whatever body is in issue “*must be effected by, i.e., directly provided for in, an enactment*”. The ER Group is a company registered under the Federal corporations law, and there is nothing before me to indicate that its establishment is directly provided for by a State enactment. I am therefore satisfied that it does not fall within the scope of s.9(1)(a)(i) of the FOI Act.
- 3.9 The ER Group must therefore fall within the scope of s.9(1)(a)(ii) of the FOI Act in order for it to meet the definition of public authority. The requirements of s.9(1)(a)(ii) were explained by Commissioner Bevan in *Re Barker and World Firefighters Games, Brisbane, 2002* (2001) 6 QAR 149. At p.18 Commissioner Bevan found that:

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.

- 3.10 No evidence has been put before me to indicate that the ER Group was established by government or for a public purpose, or that it was established under any enactment other than the Federal corporations law. It is clearly a commercial entity which is periodically retained by QR to provide recruitment services. The applicant has however raised a “*public interest aspect*” in support of his contention that I should find that the ER Group is an agency subject to the application of the FOI Act.

The applicant’s submissions

- 3.11 The applicant’s main contention is that:

... ER Group was involved in a relationship with a Government Department (Q Rail) whereby tax payer funds were being expended by Q Rail with ER Group being the recipient.

... the nature of the relationship between it [the ER Group] and Q Rail should be explored in isolation for the express purposes of rendering it an agency for the purposes of the Freedom of Information Act 1992.

- 3.12 The applicant also relies on “*proposed changes to Freedom of Information laws that will see the release of information in circumstances such as this*” to support his argument that the ER Group is an agency for the purposes of the FOI Act. Whether or not any such amendments to the FOI Act are proposed – and there is nothing before me to indicate that they are – is of no relevance to this external review application. The Information Commissioner (or her delegate) can only determine applications for external review in accordance with the FOI Act as it is at the time of the review. The Act does not currently extend to a body, which is not an agency within the definition of that term in the Act, merely because that body is performing services for or on behalf of an agency which the agency could (and perhaps on other occasions does) perform for itself.
- 3.13 The applicant argues that it is “*appropriate to refer to the Commonwealth FOI Act*” to determine this issue. The access provisions of the Commonwealth FOI Act have been extended to cover documents brought into existence in the performance of certain outsourced functions of government; see s.4(1) of the Act. However, as the Queensland FOI Act presently contains no such provision, the Information Commissioner does not have the jurisdiction to unilaterally extend the provisions of the FOI Act to bodies to which they are not intended to apply.
- 3.14 Section 9 of the FOI Act does not require consideration of public interest factors; a body either does or does not fall within the definition of a public authority. The Information Commissioner has no jurisdiction to extend that definition because the public interest (whether in relation to according natural justice/procedural fairness or to any other matter for the public benefit) might be served by allowing public scrutiny of documents held by a private sector entity. The fact that the ER Group receives payment for services from QR – even though those services could be performed by QR itself – is not sufficient to satisfy the requirements of s.9(1)(a)(ii) of the FOI Act. Accordingly, I find that the ER Group does not fall within the definition of a public authority under s.9(1)(a)(ii) of the FOI Act.

Conclusion

- 3.15 I am satisfied that the ER Group is not a public authority for the purposes of the FOI Act; that the applicant was not entitled to apply to the ER Group under the FOI Act for access to documents in its possession; and that the ER Group was entitled to refuse to accept and deal with the applicant’s purported FOI access application dated 14 December 2005.
- 3.16 This does not mean, however, that documents created by or concerning the ER Group cannot be accessed under the FOI Act. Any such documents in the possession or control of a body which is an agency for the purposes of the FOI Act will be subject to the FOI Act (see *Re McPhillimy and Queensland Treasury* (1996) 3 QAR 287). I note that the applicant has made an access application to QR which may have obtained for him some or all of the matter to which he sought access from the ER Group.

DECISION

- 4.1 I find that the ER Group is not a body which is subject to the application of the FOI Act. Accordingly, the ER Group was entitled to refuse to deal with the applicant’s request, dated 14 December 2005, for access to documents under the FOI Act.

- 4.2 I therefore find that I do not have jurisdiction to further deal with the applicant's application for external review dated 12 March 2006.
- 4.3 I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

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S Barker

Assistant Information Commissioner

Date: 31 July 2006