

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 97014**  
**Application S 84/97**

## **Participants:**

**JOHN ORR**  
**Applicant**

**BOND UNIVERSITY**  
**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*.

*Freedom of Information Act 1992 Qld* s.8, s.9(1), s.9(1)(a), s.9(1)(a)(i), s.9(1)(a)(ii),  
s.9(1)(b), s.9(1)(c), s.9(1)(d), s.9(1)(e), s.9(2), s.27(4), s.79(1)  
*Bond University Act 1987 Qld* s.2, s.3, s.4  
*Education (General Provisions) Act 1989 Qld* s.69  
*Judicial Review Act 1991 Qld*  
*University of Queensland Act 1965 Qld* s.32

*Anti-Cancer Council of Victoria; Ex parte State Public Services Federation, Re*  
(1992) 175 CLR 442; 66 ALJR 817; 109 ALR 240  
*Christie and Queensland Industry Development Corporation, Re* (1993) 1 QAR 1  
*English and Queensland Law Society Inc, Re* (1995) 2 QAR 714  
*McPhillimy and Gold Coast Motor Events Co, Re* (Information Commissioner Qld,  
Decision No. 96018, 31 October 1996, unreported)  
*Orr v Bond University* (Supreme Court of Qld, No. 2337/96, Dowsett J, 3 April 1996,  
unreported)

## **DECISION**

I decide that the respondent is not an agency subject to the *Freedom of Information Act 1992* Qld, and hence that—

- (a) the respondent was entitled to refuse to deal with the applicant's applications dated 11 and 12 March 1997 for access to documents under the *Freedom of Information Act 1992* Qld; and
- (b) I do not have jurisdiction to deal further with the applicant's application for review dated 22 May 1997.

Date of decision: 8 October 1997

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F N ALBIETZ  
**INFORMATION COMMISSIONER**

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## **Participants:**

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BOND UNIVERSITY  
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## **REASONS FOR DECISION**

### **Background**

1. The applicant seeks review of the respondent's decision to refuse to deal with his applications 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.
2. By letters dated 11 and 12 March 1997, Mr Orr applied to Bond University for access to certain documents under the FOI Act. By letter dated 8 April 1997, Mr A Finch, Registrar of Bond University, replied to those letters stating, "*Bond University is a private entity, was not established by the Bond University Act and is therefore not a public authority covered by the terms of the Freedom of Information Act.*" Mr Orr then applied to me for review, under Part 5 of the FOI Act, of the University's decision, or deemed decision, to refuse him access to the documents he sought.

### **Issue for determination**

3. The initial issue for determination in this external review is whether Bond University is a "public authority" in terms of s.9(1) of the FOI Act. If it is, then Bond University is an agency for the purposes of the FOI Act and Mr Orr was entitled to make his applications for access to documents held by it, and to have Bond University deal with those applications within the time limit set out in s.27(4) of the FOI Act. As that time limit had expired by the date on which Mr Orr made his application to me, he would have been entitled to make an application for external review on the basis of a deemed refusal of access by the agency (see s.79(1) of the FOI Act), and I would have jurisdiction to deal with his application for review. If, however, Bond University is not a public authority within the terms of s.9(1) of the FOI Act, I have no jurisdiction to deal further with the matter.

4. I have considered the nature and extent of my powers and functions in relation to jurisdictional issues in a number of previous cases, including *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1, *Re English and Queensland Law Society Inc* (1995) 2 QAR 714 and *Re McPhillimy and Gold Coast Motor Events Co* (Information Commissioner Qld, Decision No. 96018, 31 October 1996, unreported). It is clear that I have both the power, and the duty, to determine preliminary jurisdictional questions: see *Re Christie* at pp.5-6; paragraphs 8-13.

#### **External review process**

5. After considering the material provided by Mr Orr with his application for external review, the response of Bond University to Mr Orr's initial access applications, and the terms of the *Bond University Act 1987* Qld, I communicated to Mr Orr my preliminary view that Bond University is not a public authority within the terms of s.9(1) of the FOI Act. Mr Orr advised me that he did not accept my preliminary view, and made submissions dated 12 August, 2 September and 18 September 1997 in support of his case. With the last of those submissions, Mr Orr also provided an extract from the Gold Coast Bulletin relating to Bond University, and a copy of the judgment of Dowsett J in *Orr v Bond University* (Supreme Court of Qld, No. 2337/96, Dowsett J, 3 April 1996, unreported) concerning a request for written reasons for decision made by Mr Orr under the *Judicial Review Act 1991* Qld. I have provided copies of this material to Bond University (subject to the deletion of a small amount of matter claimed by Mr Orr to require confidential treatment), but I have not found it necessary to obtain a response from Bond University.

#### **Is Bond University a "public authority"?**

6. It is clear that Bond University is not a department or a local government, and hence, to be an agency subject to the FOI Act, it must fall within the definition of "public authority": see s.8 and s.9 of the FOI Act. Mr Orr contends that Bond University is a public authority under both limbs of s.9(1)(a) of the FOI Act. Section 9(1)(a) provides:

*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; ...*

*...*

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

7. Mr Orr's submissions contain lengthy arguments as to why it is in the public interest that Bond University should be subject to the FOI Act. He has also referred to the High Court decision of *Re Anti-Cancer Council of Victoria; Ex parte State Public Services Federation* (1992) 175 CLR 442; 66 ALJR 817; 109 ALR 240, which discusses the meaning of the term "public authority" in the context of industrial law. However, the general discussion of the meaning of the term which appears in that case, and the public interest considerations favouring application of the FOI Act to Bond University to which Mr Orr has adverted, must give way to Parliament's clear intention in setting out, in s.9 of the FOI Act, the limits of the term "public authority" for the purposes of the application of the FOI Act. My function is to interpret and apply that provision. If Bond University does not fall within the terms of s.9 of the FOI Act, then it is not a public authority for the purposes of the FOI Act.

### **Section 9(1)(a)(i)**

8. One of the requirements of s.9(1)(a)(i) is that the body under consideration must have been "established ... by an enactment". I discussed the meaning of the phrase "established ... by an enactment" in *Re English* at pp.732-734, paragraphs 63-70 (see also paragraphs 17-19 of *Re McPhillimy*). At p.743, paragraph 69, of *Re English*, I said:

69. *I am of the view that, in interpreting the word "by" according to its ordinary meaning in the context of s.9(1)(a)(i) of the FOI Act (i.e., in the phrase "a body that ... is established ... by an enactment"), it signifies that the establishment of the body in question (as a body corporate, or as an unincorporated body) must be effected by, i.e., directly provided for in, an enactment. The unincorporated body known as the Queensland Law Association, which existed from 1883 until 1 April 1928, did not derive its status as such from any enactment, and hence was not "established [as an unincorporated body] by an enactment". In direct contrast, the Society's status as a body corporate, since 1 April 1928, derives entirely from the 1927 Act. The Society was "established" (or alternatively, to use the included terms in the definition of the word "establish" in s.36 of the Acts Interpretation Act, "constituted" or "continued in existence") as a body corporate by s.3(1) of the 1927 Act.*

9. The long title and preamble to the *Bond University Act 1987* state:

***An Act to provide in relation to the operation of a university in Queensland under the name and style Bond University.***

***Preamble***

*Whereas a company limited by guarantee has been incorporated under the Companies (Queensland) Code by the name 'Bond University Limited' having as its objects the establishment, maintenance, promotion and operation of a university in Queensland under the name and style 'Bond University'.*

*And whereas it is desirable that statutory provision be made in relation to the operation of Bond University and certain of the powers of the company controlling Bond University.*

10. Section 2 of the *Bond University Act* provides that, "In this Act—"**Bond University**" means the centre for education and learning established by the university company in pursuance of its objects provided for by its memorandum of association; ...". The "university company" is Bond University Limited. The Act goes on to set out a number of additional powers to be held by Bond University Limited, for example, the power to award and confer degrees, diplomas, *et cetera*, the power to use the name Bond University, and the power to appoint a Visitor, plus some restrictions, for example, a prohibition on discrimination.
11. In *Orr v Bond University*, Dowsett J made the following comments with regard to Bond University:

*The respondent company is a company limited by guarantee and conducts the Bond University which is situated at the Gold Coast. In 1987 the Queensland Parliament passed the Bond University Act which provides relevantly as follows in sections 3 and 4:*

**3.(1)** The function of the university company is to pursue, within the limits of financial resources available to it, the objects provided by its memorandum of association, and in particular, the university company may award and confer degrees, diplomas and other awards as awards of a tertiary educational institution.

**(2)** In the discharge of its function the university company has and may exercise within the limits of financial resources available to it the powers conferred on it by its memorandum of association and in particular -

(a) may do all such things as are necessary or reasonably desirable for the proper maintenance, promotion or operation of Bond University; and

(b) may establish, abolish, replace and add to faculties, departments, schools or other organisational sections or units within Bond University as the university council thinks fit.

**(3)** Nothing in this section shall be construed to excuse or exempt the university company from complying with law that apart from this Act would apply to the company.

#### **Use of name 'Bond University'**

**4.** Notwithstanding the provisions of any other Act, the university company and the university council is each authorised to use the name 'Bond University' in the discharge of its functions and exercise of its powers in relation to the conduct of Bond University.

*Of course, Bond University Ltd has its own Memorandum and Articles of Association pursuant to which it operates. Pursuant to article 18, it has adopted a series of regulations relating to the conduct of the university. It is a little difficult to see why it should have been necessary for Parliament to pass the Act*

*in question. Reference to the second reading speech indicates that the primary motivation was to give the university some appropriate prestige, it being the first privately owned university in Australia.*

*It also seems that there were, or are now, legal limitations upon the right to use the name "university" and to confer degrees, or hold oneself out as authorised to confer degrees. It is probable that the purpose of the Act was to resolve potential problems associated with these matters.*

(I do not suggest by quoting these passages that the issues which Dowsett J was called on to determine were identical to those which I must consider. As Mr Orr has correctly pointed out, the issues are quite distinct. However, I do consider that the passages give an apt description of the position with respect to the constitution of Bond University.)

12. I have been unable to locate any restrictions, in legislation administered by the Department of Education, on the use of the name 'university' at the time that the *Bond University Act* was passed (it may be that there was some restriction contained in companies, or business names, legislation). However, there was certainly a restriction on the conferring of certain awards (see s.32 of the *University of Queensland Act 1965* Qld, which was repealed by the *Education (General Provisions) Act 1989* Qld and replaced by s.69 of the latter Act, which, in addition, contained a restriction on the use of the name 'university').
13. In my view, Bond University Limited, which operates as Bond University, cannot be said to have been established by an enactment. It is a company incorporated by private sector interests, under legislation governing corporations. Its position is far different from that of the Queensland Law Society which was considered in *Re English*. The Queensland Law Society was constituted as a corporation by an Act of the Queensland Parliament. The *Bond University Act* does no more than confer additional powers and restrictions on Bond University Limited, a body corporate which was established by private sector interests prior to the enactment of the *Bond University Act*.
14. Mr Orr submits that the establishment of the University can be distinguished from the establishment of the company which operates under that name, but my view is that Bond University is simply the name under which Bond University Limited operates, and is not a distinct entity. I note that the definition of "Bond University" in s.2 of the *Bond University Act* clearly acknowledges that Bond University is established by the university company. Mr Orr argues that the University could not have been created without the *Bond University Act*. But neither of the provisions discussed at paragraph 12 above required authorisation by an Act of Parliament for use of the name 'university' or for conferring awards. Such approval could alternatively have been given by the relevant Minister. In any event, the fact that some form of government or parliamentary approval was necessary, either by legislation or ministerial approval, is not sufficient to justify a finding that the respondent was established by an enactment. Even if Bond University could be regarded as distinct from Bond University Limited (which I do not believe to be the position), the *Bond University Act* would have done no more than allow Bond University Limited to establish Bond University.
15. I note that Mr Orr submits that the preamble to the *Bond University Act*, "*specifically states that the Act is to create quote unquote the university*". But examination of the preamble (quoted at paragraph 9 above) shows that that is not the case.

16. I find that Bond University is not a public authority within the terms of s.9(1)(a)(i) of the FOI Act.
17. Even if I were satisfied that Bond University was established by an enactment, a question would remain as to whether it was established for a public purpose. Mr Orr has made lengthy submissions relating to the traditional status of universities within England and Australia. However, it must be recognised that the establishment of Bond University as a private university is a significant departure from that tradition, and there is a real question as to whether a private educational institution can be said to have been "established for a public purpose" within the terms of s.9(1)(a)(ii) of the FOI Act. However, that is a matter which it is not necessary for me to determine in reaching my decision, and I do not propose to deal with it at this time.

### **Section 9(1)(a)(ii)**

18. One of the requirements of this provision is that the body is "established by government". For similar reasons to those discussed above, I find that Bond University was not established by government. Bond University Limited is a company which was established by private sector interests before the passing of the *Bond University Act*. It operates under the name Bond University with the sanction of the *Bond University Act*, but that does not mean that it was established by government. Alternatively, if Bond University is a separate entity from Bond University Limited and s.2 of the *Bond University Act* correctly states the position, Bond University was created by Bond University Limited, not by government. It therefore does not fall within the terms of s.9(1)(a)(ii) of the FOI Act.
19. I note that Mr Orr did not seek to rely on s.9(1)(b), (c), (d) or (e), or on s.9(2), to support his case, and it is clear that Bond University does not fall within the terms of any of those provisions.

### **Conclusion**

20. I find that Bond University is not a public authority within the terms of s.9 of the FOI Act and is therefore not an agency subject to the application of the FOI Act. Accordingly, I decide that—
- (a) Bond University was entitled to refuse to deal with Mr Orr's FOI access applications dated 11 and 12 March 1997; and
- (b) I do not have jurisdiction to deal further with Mr Orr's application for external review dated 22 May 1997.

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 F N ALBIETZ  
**INFORMATION COMMISSIONER**