

## OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 03/2005**  
**Application 310/04**

### **Participants:**

NICK TEDESCO  
**Applicant**

MT GRAVATT DISTRICT COMMUNITY SUPPORT INC.  
**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 "public authority " within the terms of s.9(1) of the *Freedom of Information Act 1992 Qld*.

*Freedom of Information Act 1992 Qld* s.4, s.7, s.8(1), s.9(1)(a)(i), s.9(1)(a)(ii), s.9(1)(b), s.9(1)(c), s.21, s.25, s.27(2), s.75  
*Associations Incorporation Act 1981 Qld*

*Barker and World Firefighters Games, Brisbane, 2002, Re* (2001) 6 QAR 149  
*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* (1996) 3 QAR 376

## **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 application dated 1 March 2004 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 received 21 May 2004.

Date of decision: 21 March 2005

.....  
CATHI TAYLOR  
**INFORMATION COMMISSIONER**

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MT GRAVATT DISTRICT COMMUNITY SUPPORT INC.

**Respondent**

## **REASONS FOR DECISION**

### **Background**

1. This application requires determination of a jurisdictional issue as to whether or not the Mt Gravatt District Community Support Inc. (the Association) is an agency subject to the application of the *Freedom of Information Act 1992 Qld* (the FOI Act).
2. The Association is an incorporated body under the provisions of the *Associations Incorporation Act 1981 Qld*, and receives funding from the Department of Housing (the Department) to deliver Home Assist Secure (HAS) services to eligible members of the community. As set out in a Fact Sheet available on the Department's website, "Community Housing - What is Home Assist Secure?", HAS services are delivered through "*grants to local government and community organisations*". In this case, the Association provided HAS services to the applicant.
3. By correspondence dated 1 March 2004, the applicant applied to the Association for access, under the FOI Act, to "*all copies of N. Tedesco files & correspondence*". Having received no acknowledgment of his FOI access application, or response to a subsequent letter dated 30 March 2004, the applicant applied to this office on 13 April 2004 for review, under Part 5 of the FOI Act, of the Association's decision to refuse him access to documents under the FOI Act.
4. Pursuant to s.75 of the FOI Act, a staff member of my office made preliminary inquiries with the Association for the purpose of determining whether or not the Information Commissioner had jurisdiction to deal with the applicant's application for review dated 13 April 2004. The result of those inquiries was conveyed to the applicant by letter dated 21 April 2004. The applicant was advised that the Management Committee of the Association had resolved to provide the applicant with copies of the documents to which he sought access, and on that basis it was not necessary for this office to pursue further inquiries. The applicant's application for review received by this office on 13 April 2004 was therefore treated as withdrawn.

5. After receiving the documents that the Association had resolved to send the applicant, the applicant lodged an "*FOI objection*" with the Association. That objection described other documents that the applicant considered the Association ought to have in its possession or ought to have provided to him. Having received no response from the Association, on 21 May 2004, the applicant applied again to this office for review, this time in respect of the Association's failure to locate and deal with all documents responsive to his FOI access application dated 1 March 2004, otherwise known as 'sufficiency of search'. However, as was explained to the applicant by letter dated 1 June 2004, it would first be necessary to determine whether the Information Commissioner has the power to review the matter to which the applicant's application for review received on 21 May 2004 relates.

#### **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 at pp.4-6 and *Re English and Queensland Law Society Inc* (1995) 2 QAR 714 at pp.719-720. Adopting the reasons given by former Information Commissioner, Mr F N Albietz, I consider that the Information Commissioner has both the power, and a duty, to consider and determine issues relating to the limits of his/her jurisdiction, when they are raised as an issue in an application for review lodged under Part 5 of the FOI Act.

#### **The review process**

7. On 1 June 2004, the applicant was advised that this office would be pursuing inquiries in accordance with s.75 of the FOI Act, for the purpose of determining whether the Information Commissioner has the jurisdiction to review the matter to which the applicant's review application relates, i.e., whether the Association is an "agency" for the purposes of the FOI Act. By that date, the Association had advised it did not consider itself subject to the FOI Act, and had provided to this office a copy of its Constitution, executed on 7 December 1990.
8. By letter dated 3 June 2004, the Association was invited to provide a written account detailing the individuals or organisations who took the steps to establish the Association in its present form. On 7 June 2004, the President of the Association, Ms Bernadette Dawson (who also stated she was involved in the establishment of the Association) advised a member of my staff that the Association was formed in 1990 after a series of community meetings, and that following the drafting of its constitution, the Association was incorporated. The manner in which the Association was established is supported in a document titled, "A Brief History of the Organisation", subsequently provided to this office by the Association, which document, I understand, is provided to interested organisations and/or prospective sponsors as background information. Independent inquiries were also conducted with the Department of Tourism, Fair Trading and Wine Industry Development, which confirmed the Association was incorporated.
9. By letter dated 17 June 2004, the applicant was provided a preliminary view from this office that the Association is not an agency subject to the application of the FOI Act. In the event that the applicant did not accept that preliminary view, the applicant was invited to lodge submissions and/or evidence in support of his case. By correspondence received on 25 June 2004, the applicant advised that he contested that preliminary view. A further letter, purporting to be the applicant's submissions, was received on 5 July 2004.

10. In making this decision, I have taken into account:

- the applicant's FOI access application dated 1 March 2004, and his application for external review received by this office on 21 May 2004;
- records of telephone conversations between the President of the Association and a member of my staff on 25 May 2004, 28 May 2004, 7 June 2004 and 11 June 2004;
- record of a telephone conversation between a member of staff of the Department of Tourism, Fair Trading and Wine Industry Development and a member of my staff on 2 June 2004;
- the Constitution of the Association;
- a document titled "Brief History of the Organisation";
- the applicant's correspondence received on 25 June 2004 and 5 July 2004.

**The relevant provisions of the FOI Act**

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

***Preamble***

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

...

***Object of Act***

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

...

*7. In this Act—*

*"agency" has the meaning given by section 8;*

...

*"enactment" means an Act or a statutory instrument;*

...

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

*8.(1) In this Act—*

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

...

**9.(1)** *In this Act—*

**"public authority"** *means—*

- (a) *a body (whether or not incorporated) that—*
  - (i) *is established for a public purpose by an enactment; or*
  - (ii) *is established by government for a public purpose under an enactment.*
- (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.*

**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; ...*

12. Section 21 of the FOI Act provides that, subject to the provisions of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency. Section 8(1) defines "agency". Since the Association is neither a department nor a local authority within that definition, the issue is whether or not it is a "public authority" as defined in s.9(1) of the FOI Act. If it is, then the Association is subject to the obligations imposed on agencies by the FOI Act, and, pursuant to s.21, the applicant has a legally enforceable right (subject to the application of other provisions of the FOI Act, e.g., the exemption provisions contained

in Part 3, Division 2, of the FOI Act) to be given access to documents held by the Association. If, however, the Association is not a "public authority" within the terms of s.9(1) 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.

13. Clearly, sections 9(1)(d), 9(1)(e) and 9(3) which apply to persons rather than corporations are not relevant, nor is s.9(2) which covers certain unincorporated bodies.
14. The central argument that the applicant raised in his correspondence received on 5 July 2004 was that:

[the Association] *receives funding from Govt Depts and carries out its services for* [the Department].

...

*Q. Who does [the Association] answer to > and how can I receive the files.*

However, the fact that the Association receives some funding from the Department does not mean that its documents are accessible under the FOI Act; the Association must answer the description of a "public authority" as defined in s.9(1) of the FOI Act.

#### **Application of s.9(1)(a) of the FOI Act**

15. The Association 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. In *Re English* the former Information Commissioner, Mr F N Albietz, 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 Association.
16. Turning now to s.9(1)(a)(ii) of the FOI Act, and as explained by the Information Commissioner in *Re Barker and World Firefighters Games, Brisbane, 2002* (2001) 6 QAR 149 (at paragraph 18), there are three requirements which must be shown before a body will be caught within the definition of public authority under s.9(1)(a)(ii) of the FOI Act:

*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.*

17. For the purposes of the FOI Act, a body which has been incorporated under the provisions of the *Associations Incorporation Act 1981* Qld is established "under an enactment", as provided for in s.9(1)(a)(ii) of the FOI Act. I am also satisfied that the Association was established for a public purpose, as its objectives, set out in the Constitution include, amongst other things:

(1) *Generally to assist people living in the Mt Gravatt, Mansfield, Wishart, Holland Park and surrounding areas whose lives are not being fulfilled, because of isolation, age, family stress, family breakdown, illness, or other misfortune;*

...



- (3) *To promote and support programs undertaken by Statutory Authorities, Voluntary Welfare Organizations and other Community Groups designed to contribute to the well being of individuals and groups who may be disadvantaged, or socially, physically, intellectually or emotionally vulnerable;*

...

- (5) *To promote and develop programs and activities to meet the needs of the people in the communities of Mount Gravatt, Wishart, Mansfield, Holland Park and surrounding areas;*

...

18. However, as to the remaining requirement, it cannot be said that the Association was established by government. As set out in the "Brief History of the Organisation", the Association was established by a group of concerned citizens. The relevant part of that document provides:

*In February 1990, a group of concerned citizens of Mt Gravatt District called a Public Meeting to ascertain the predominant needs of the Local Community. From this meeting a core of committed residents met on a fortnightly basis for 21 months during which they were involved in identifying the needs of the community, establishing the organisational structure to become incorporated, planning the programmes to be implemented by the Neighbourhood Centre and raising funds to achieve this goal.*

19. For the foregoing reasons, I find that the Association does not fall within the terms of either s.9(1)(a)(i) or s.9(1)(a)(ii) of the FOI Act.

**Application of s.9(1)(b) of the FOI Act**

20. Section 9(1)(b) of the FOI Act does not apply to the Association because it was not created by the Governor in Council or a Minister, but by a group of concerned citizens.

**Application of s.9(1)(c) of the FOI Act**

21. The Association answers the description in s.9(1)(c)(i)(B) of the FOI Act, but to be caught by the terms of 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 Association.

**Conclusion**

22. For the foregoing reasons, I find that the Association 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 the applicant's letter dated 1 March 2004 seeking access to documents under the FOI Act.
23. This does not mean that documents created by, or concerning, the Association can never be subject to the FOI Act. Any such documents in the possession or control of an agency which fall within the definition of 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* (1996) 3 QAR 287, documents of the Gold Coast Motor Events Co, copies of which were in the possession of Queensland Treasury, were subject to the FOI Act through an access application made to Queensland Treasury.)

24. I do not have jurisdiction to deal further with the applicant's application for external review received on 21 May 2004.

.....  
CATHI TAYLOR  
**INFORMATION COMMISSIONER**