

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2002
Application S 11/02

Participants:

NEIL WEEKES

Applicant

CRIME STOPPERS QUEENSLAND LIMITED

Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - jurisdiction of Information Commissioner - whether the respondent is an agency subject to the application of the *Freedom of Information Act 1992 Qld* - whether the respondent is "a body that forms part of the agency" within the terms of s.8(2)(a) of the *Freedom of Information Act 1992 Qld* - whether the respondent is "a body that exists mainly for the purpose of enabling the agency to perform its functions" within the terms of s.8(2)(b) of the *Freedom of Information Act 1992 Qld*.

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

Attorney-General v Estcourt and The Wilderness Society Inc (1995) 4 Tas R 355
Christie and Queensland Industry Development Corporation, Re (1993) 1 QAR 1
English and Queensland Law Society Inc, Re (1995) 2 QAR 714
Federal Commissioner of Taxation v Students World (Australia) Pty Ltd
(1978) 138 CLR 251
McPhillimy and Gold Coast Motor Events Co, Re (1996) 3 QAR 376

DECISION

I decide that -

- (a) the respondent is not an agency as defined in s.8 of the *Freedom of Information Act 1992* Qld, and is not subject to the application of the *Freedom of Information Act 1992* Qld; and
- (b) accordingly, I have no jurisdiction to deal with the applicant's application for review of the respondent's refusal to provide access to requested documents under the *Freedom of Information Act 1992* Qld.

Date of decision: 26 June 2002

.....
D J BEVAN
INFORMATION COMMISSIONER

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2002
Application S 11/02

Participants:

NEIL WEEKES

Applicant

CRIME STOPPERS QUEENSLAND LIMITED

Respondent

REASONS FOR DECISION

Background

1. This application requires determination of a jurisdictional issue as to whether or not Crime Stoppers Queensland Limited ("CSQ") is an agency subject to the application of the *Freedom of Information Act 1992 Qld* (the FOI Act). CSQ is an Australian public company limited by guarantee. The Memorandum of Association states that the objectives of CSQ are to promote public involvement in the apprehension and conviction of criminals, to encourage people to furnish information enabling the apprehension and conviction of criminals, and to foster general awareness of criminal activity and the need to counteract it.
2. By letter dated 7 November 2001, the applicant applied to CSQ for access, under the FOI Act, to specified financial records of CSQ, principally relating to payments made to individual members of the Board of Directors of CSQ, especially in relation to travel expenses. By letter dated 7 January 2002, Ms Vicki Howard, Secretary of CSQ, replied stating: "*The Board at its meeting on 18 December 2001 considered your letter dated 7 November 2001. This company is not an "agency" as defined in the Freedom of Information Act 1992. Accordingly, your application is refused.*" By letter dated 11 January 2002, the applicant applied to this Office for review, under Part 5 of the FOI Act, of CSQ's decision to refuse him access to documents under the FOI Act.

Jurisdiction of the Information Commissioner

3. The former Information Commissioner, Mr F N Albietz, considered the nature and extent of the powers and functions of the Information Commissioner in relation to jurisdictional issues of this kind in a number of cases, including *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1 at pp.4-6, and *Re English and Queensland Law Society Inc* (1995) 2 QAR 714 at pp.719-720. I adopt the reasons given by Commissioner Albietz in those cases. I consider that the Information Commissioner has both the power, and a duty, to consider and determine issues relating to the limits of his jurisdiction, when

they are raised as an issue in an application for review lodged under Part 5 of the FOI Act. (See also the comments on the obligation of a tribunal to decide a dispute over the limits of its jurisdiction, contained in the judgment of Wright J of the Supreme Court of Tasmania in *Attorney-General v Estcourt and The Wilderness Society Inc* (1995) 4 Tas R 355 at pp.365-367.)

4. By letter dated 14 January 2002, the Deputy Information Commissioner advised CSQ that, consistently with the approach adopted in *Re English* (a case which dealt with the issue of whether or not the Queensland Law Society Inc was an agency subject to the application of the FOI Act), he proposed to undertake preliminary inquiries, in accordance with s.75 of the FOI Act, for the purpose of determining whether the Information Commissioner has power to review the matter to which the applicant's external review application relates, i.e., whether CSQ is an "agency", for the purposes of the FOI Act, because it answers one of the statutory descriptions contained in s.8(2), s.9(1)(a)(ii) or s.9(1)(b) of the FOI Act. The Deputy Information Commissioner invited CSQ to lodge written submissions and/or evidence explaining precisely how, and pursuant to what legal authority, it is constituted/established, and setting out all facts, matters and circumstances, and any legal arguments, on which CSQ wished to rely in support of its contention that it is not an agency subject to the application of the FOI Act.
5. The solicitors for CSQ (Deacons, Lawyers) responded by letter dated 13 February 2002, in which they made a number of submissions in support of their client's case, and enclosed copies of CSQ's Memorandum and Articles of Association, Constitution, and annual reports for the preceding five years.
6. By letter dated 26 February 2002, Assistant Information Commissioner Moss wrote to the applicant to advise him that, after reviewing all relevant material then before her, she had formed the preliminary view that CSQ was not an agency, for the purposes of the FOI Act, because it did not answer one of the relevant statutory descriptions contained in s.8(2), s.9(1)(a)(ii) or s.9(1)(b) of the FOI Act. CSQ's submissions dated 13 February 2002 were provided to the applicant. In the event that he did not accept her preliminary view, Assistant Information Commissioner Moss invited the applicant to lodge submissions and/or evidence in support of his case, and in response to the submissions lodged on behalf of CSQ. The applicant provided submissions in response in a letter dated 20 March 2002. The applicant's submissions were provided to the solicitors for CSQ, who lodged short points of reply on behalf of CSQ on 22 April 2002.
7. In a telephone discussion with a member of my staff on 29 April 2002, the applicant confirmed that he accepted the preliminary view of Assistant Information Commissioner Moss in so far as it conveyed the view that CSQ does not fall within the statutory descriptions contained in s.9(1)(a)(ii) and s.9(1)(b) of the FOI Act. The material forwarded to my office by CSQ clearly demonstrates that CSQ is not:
 - a body established by an enactment (within the terms of s.9(1)(a)(i) of the FOI Act);
 - a body established by government (within the terms of s.9(1)(a)(ii) of the FOI Act);
 - a body created by the Governor in Council or a Minister (within the terms of s.9(1)(b) of the FOI Act); or
 - a body declared by regulation to be a public authority for the purposes of the FOI Act (within the terms of s.9(1)(c) of the FOI Act).

Accordingly, the only issue for my determination is the validity of the applicant's contention that CSQ is a body which is subject to the FOI Act, by virtue of s.8(2) of the FOI Act.

8. In making my decision on the jurisdictional issue, I have taken into account the submissions made by CSQ's solicitors dated 13 February 2002 and 22 April 2002 (and the documents relating to the establishment of CSQ provided by CSQ's solicitors), and the applicant's letter dated 11 January 2002 and written submission dated 20 March 2002.

The relevant provisions of the FOI Act

9. The following provisions of the FOI Act are relevant to the determination of the issue of whether or not CSQ 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;

...

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.*

...

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; 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.

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; ...*

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

10. The former Information Commissioner, Mr F N Albietz, considered the operation of s.8(2) of the FOI Act in *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376. At paragraphs 37-41, he said:

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.

11. Accordingly, the issue for determination in this case is whether or not CSQ forms part of the Queensland Police Service (the QPS) (which clearly is an agency for the purposes of the FOI Act), or exists mainly for the purpose of enabling the QPS to perform its functions. If it does, then an application for access, under the FOI Act, to documents of CSQ must be dealt with by the QPS in accordance with Part 3 of the FOI Act. If it does not, then CSQ is not a body which is subject to the FOI Act, and I have no jurisdiction to deal further with the applicant's application for review.

Discussion of submissions lodged by participants

12. At the commencement of this review, one of the issues which the Deputy Information Commissioner invited CSQ to address was whether, in the terms of s.8(2)(b) of the FOI Act, CSQ is a body that exists mainly for the purpose of enabling the QPS to perform its functions.
13. The central argument which CSQ's solicitors raised in response (in their submission dated 13 February 2002) was that the word "enabling", as used in the context of s.8(2)(b) of the FOI Act, required something more than the possibility that CSQ might assist the QPS in performing its functions. The solicitors for CSQ submitted that the relevant "function" of the QPS might be law enforcement, and that from time to time information received and passed on to the QPS by CSQ might improve the effectiveness of law enforcement by providing the QPS with sources of information which it might not have otherwise had. The solicitors for CSQ submitted, however, that that in itself was not sufficient to attract the operation of s.8(2)(b) of the FOI Act, as recognised by Commissioner Albietz in *Re McPhillimy*. The solicitors for CSQ submitted that CSQ does not "enable" the QPS to perform its functions, and that the QPS can perform its relevant functions without the input of CSQ.

14. In response, by letter dated 20 March 2002, the applicant submitted that to interpret the word "enabling" to mean that the QPS cannot perform its functions without the assistance of CSQ was placing too restrictive an interpretation on the word "enabling". The applicant submitted that "enabling" means, in the context of s.8(2)(b) - 'assisting, facilitating, complementing and providing support to the agency so that it ... may (better) perform its functions'. In support of his case, the applicant submitted:

The Objects of CSQ as enshrined in that organisation's Constitution are as follows:

1. *To improve the well-being and security of the Queensland community and the effectiveness of the **law enforcement** and emergency services operating in the State of Queensland;*
2. *To encourage people, whether by means of material inducement or otherwise, to furnish the **proper authorities** with information enabling the **apprehension and conviction of criminals**;*
3. *Fostering general awareness of **criminal activity** and the need to counteract it by assisting **those authorities** wherever possible.*

Each of these Objects makes specific mention of "law enforcement", or "proper authorities", or "apprehension and conviction of criminals", all of which implicitly mean or involve the QPS. If one were to summarise the CSQ's Objects it would be along the lines of "The purpose of CSQ is to assist the QPS to resolve unresolved crimes."

...

The CSQ logo ... clearly shows the blue and white chequered pattern which is synonymous with the QPS. The public perception of CSQ, reinforced by this logo and the advertisements for CSQ, is that CSQ is a part of the QPS and that the two organisations are inextricably linked.

...

While it may be correct to state that a call to the CSQ number 1800 333 000 may be answered by a person stating "CRIMESTOPPERS", inevitably that person is a member of the QPS. In fact there is a special QPS unit called the Crime Stoppers Unit, which is part of the QPS State Crime Operations Command. It is the members of the QPS Crime Stoppers Unit who operate the Crime Stoppers number, not members of CSQ.

In addition, it is the Crime Stoppers Unit that receives information from the general public and it is this Unit, and not members of CSQ ... who pass information to the other relevant police units to respond. ... The QPS also have a scale for determining the issue of financial rewards. The QPS makes the decision on what amount of reward should be paid and then recommends that the Board of Directors of CSQ actually approve this amount, as it is CSQ that actually has the control of funds.

As can be seen from the above, CSQ is inextricably linked with the QPS. CSQ exists solely to "enable" the QPS to apprehend and convict criminals. It has no other purpose.

...

Consequently, I contend that s.8(2)(b) of the FOI [Act] definitely applies to CSQ and that CSQ is an "agency" for the purpose of the FOI [Act].

15. In short points of reply dated 22 April 2002, CSQ's solicitors submitted that it is not the test for application of s.8(2)(b) of the FOI Act that CSQ cannot operate effectively without the QPS, and that the possibility that CSQ might assist the QPS in performing its functions is not enough to attract the operation of s.8(2)(b). CSQ's solicitors also submitted that to contend (as the applicant does) that CSQ effectively functions "as a component of the QPS", is not a correct categorisation of the relationship between CSQ and the QPS. CSQ's solicitors submitted that CSQ was established as a separate company, and whatever the "public perceptions" contended for by the applicant in his submissions, that was not sufficient to bring CSQ within the operation of s.8(2)(b) of the FOI Act.
16. Although the applicant's submission dated 20 March 2002 stated that the applicant's case in this review was based on the application of s.8(2)(b) of the FOI Act, parts of the applicant's submission suggest reliance on the application of s.8(2)(a) of the FOI Act, i.e., the applicant contended that "*CSQ is a part of the QPS*" and that "*the two organisations are inextricably linked*". I will therefore briefly address the application of s.8(2)(a) of the FOI Act.
17. It is clear from my examination of the Memorandum and Articles of Association of CSQ, and its Constitution, that CSQ was established by a group of citizens of varying backgrounds, as a non-profit organisation with the object of improving the safety and security of the Queensland community. While I acknowledge the close involvement of the QPS in the functions of CSQ, CSQ is clearly a separate legal entity. I do not consider that CSQ can be regarded as forming part of the QPS, giving the words of s.8(2)(a) their natural and ordinary meaning. Accordingly, in terms of the application of s.8(2)(a) of the FOI Act, I am not satisfied that CSQ forms part of the QPS.
18. The applicant's arguments with respect to s.8(2)(b) turn on the proper construction of the word "enabling" in the context of s.8(2)(b). The applicant contends that it should be read as meaning "assisting, facilitating, complementing and providing support." Certainly, one of the main purposes of CSQ is to assist Queensland law enforcement authorities which, in practical terms, must chiefly comprise assisting the QPS to perform its law enforcement functions. However, the QPS would still be able to perform those functions without the assistance of CSQ.
19. The applicant contends for a construction of "enabling" that does not accord with the natural and ordinary meaning of the word. Although court decisions interpreting the meaning of a particular word or phrase in a different statutory context should be treated with an appropriate degree of caution, I consider that the remarks of Mason J of the High Court of Australia in *Federal Commissioner of Taxation v Students World (Australia) Pty Ltd* (1978) 138 CLR 251 at p.265 are relevant for present purposes:

The word "enabling" is generally understood to mean "make able", "make easy" or "make possible". In an appropriate context it may mean "assist in making able or possible" or "contribute to making able or possible" ...
20. None of these possible meanings fits the relationship between CSQ and the QPS. CSQ may assist, or contribute to, the performance by the QPS of its functions, but it does not assist in, or contribute to, making the QPS able to perform its functions, or making it possible for the QPS to perform its functions.

21. To read "enabling" as if it meant "assisting" is, in my opinion, to depart too far from the natural and ordinary meaning of the word which Parliament selected to express its intention in enacting s.8(2)(b) of the FOI Act
22. My opinion in that regard is reinforced by reference to s.9(2) of the FOI Act, where Parliament turned its attention to the circumstances in which bodies like boards, councils and committees connected with a public authority (as defined in s.9(1) of the FOI Act) should be taken to be comprised within the public authority. Parliament there referred to a body established for the purpose of "assisting, or performing functions connected with, a public authority". Parliament's choice of those words in the comparable context of s.9(2) contrasts with its choice of the word "enabling" in the context of s.8(2), and, in my view, tells against the applicant's contention that Parliament should be taken to have intended the word "enabling" to mean assisting.
23. I therefore find that CSQ is not an agency within the terms of s.8(2) of the FOI Act, and is not a body subject to the application of the FOI Act. It follows that I do not have jurisdiction to deal with the applicant's application for review of CSQ's refusal to give him access to requested documents under the FOI Act.

Conclusion

24. For the foregoing reasons, I decide that:
 - (a) CSQ is not an agency as defined in s.8 of the FOI Act, and is not subject to the application of the FOI Act; and
 - (b) accordingly, I do not have jurisdiction to deal with the applicant's application for review of CSQ's refusal to provide access to requested documents under the FOI Act.

.....
D J BEVAN
INFORMATION COMMISSIONER