

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2001050
Decision Ref: D0252001**

Participants:

Gordon Walliss Inglis
Complainant

- and -

**Channel 31 Community Educational
Television Limited**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – whether the respondent is an agency subject to the *Freedom of Information Act 1992* – Glossary – meaning of “agency” – meaning of “public body or office” – refusal to deal with an access application.

Freedom of Information Act 1992 (WA) ss. 3, 10; Glossary.
Corporations (Western Australia) Act 1990 s.119
Western Australian Trotting Association Act 1946 s.3
Interpretation Act 1984 ss. 5, 18
Broadcast Services Act 1992 (Cth)

Thompson v Federal Commissioner of Taxation (1959) 102 CLR 315.
Re English and Queensland Law Society Incorporated (1995) 2 QAR 714.
Queensland Law Society Inc v Albeitz (1996) 2 Qd R 580
McNeill and Western Australian Trotting Association [1996] WAICmr 20.
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129
Minister for Transport v Edwards [2000] WASCA 394, unreported.

DECISION

The decision of the respondent is set aside. In substitution it is decided that the respondent is an agency for the purposes of the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

23 July 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by Channel 31 Community Educational Television Limited ('Channel 31') to refuse Mr Inglis ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act'). Channel 31 claims that it is not an agency under the FOI Act and that the complainant has no right of access to its documents.
2. On 26 April 2001, the complainant made an application to Channel 31 for access, under the FOI Act, to copies of minutes of various meetings of the Board of Management of Channel 31 and two videotapes. A decision was made on the same day and access was refused by Channel 31's legal adviser on the basis that Channel 31 is not subject to the FOI Act. On 26 April 2001, the complainant applied to the Information Commissioner for external review of the decision made by Channel 31.
3. After receiving this complaint, it was not apparent to me that Channel 31 was an "agency" as that term is defined in the FOI Act. Accordingly, preliminary inquiries were made and written submissions were received from the complainant, and also from Channel 31's legal adviser in support of the view that Channel 31 is not an agency. Attempts were made to reach a conciliated settlement of this complaint, but those attempts were not successful.
4. Subsequently, on 9 July 2001, after considering the material before me, including the submissions of the parties, I informed the parties in writing of my reasons for reaching the view that Channel 31 is an agency within the meaning of the FOI Act. On 16 July 2001, Channel 31's legal adviser notified my office by telephone that Channel 31 maintained its view that it is not an agency and that it did not wish to make any further submissions to me.
5. Accordingly, the issue I am required to determine is whether Channel 31 is an agency for the purposes of the FOI Act. If Channel 31 is not an agency, then the FOI Act does not apply and the complainant has no right of access to its documents. It would follow from that that I have no jurisdiction as Information Commissioner to investigate and review the decision made by Channel 31 in respect of the complainant's access application.
6. However, if Channel 31 is an agency, as that term is defined in the FOI Act, then I have jurisdiction to deal with the complainant's complaint, which involves a request for access to personal information. In the course of dealing with this complaint, Channel 31 indicated that it does not claim exemption for the requested documents, subject to appropriate deletions, but it declines to release those documents to the complainant unless it is established that Channel 31 is an agency under the FOI Act.

Bodies that are "agencies" under the FOI Act

7. The right of access to documents conferred by s.10(1) of the FOI Act is a right to be given access to the documents of an agency (other than an exempt agency), subject to

and in accordance with the FOI Act. The term “agency” is defined in clause 1 of the Glossary in Schedule 2 to the FOI Act as follows:

“**agency**” means -

- (a) a Minister; or
- (b) a public body or office,

and **“the agency”** means the agency to which an access application or application for amendment of personal information has been made or to which such an application has been transferred or partly transferred.”

8. The term “public body or office” is further defined in the Glossary as follows:

“**public body or office**” means -

- (a) a department of the Public Service;
- (b) an organization specified in column 2 of Schedule 2 to the Public Sector Management Act 1994;
- (c) the Police Force of Western Australia;
- (d) a local government or a regional local government;
- (e) a body or office that is established for a public purpose under a written law;
- (f) a body or office that is established by the Governor or a Minister; or
- (g) any other body or office that is declared by the regulations to be a public body or office being -
 - (i) a body or office established under a written law; or
 - (ii) a corporation or association over which control can be exercised by the State, a Minister, a body referred to in paragraph (a), (b), (e), (f) or (g) (i), or the holder of an office referred to in paragraph (f) or (g)(i); or
- (h) a contractor or subcontractor.”

9. Clearly, a body or organization must fall within one of the definitions of “public body or office” to be subject to the provisions of the FOI Act. It is clear to me that Channel 31 does not fall within paragraphs (a), (b), (c), (d), (f), (g) or (h) of the definition of “public body or office”. Therefore, for Channel 31 to be covered by the FOI Act, it must be a public body or office within the terms of paragraph (e) of the definition.

The submissions of Channel 31

10. Channel 31 submits that the provisions of the FOI Act must be construed having regard to the objects and intent of the legislation. Channel 31 submits that the definition of “public body or office” should be construed narrowly, having regard to s.3, because if a broad interpretation is adopted, then any corporation having at least one of its main purposes as being for the benefit of members of the community (or a substantial section of them) would fall within the jurisdiction of the FOI Act. Channel 31 claims that that would mean that charitable groups, sporting groups and community groups would be subject to the FOI Act and that such a result would be inconsistent with the objects of the FOI Act, which Channel 31 submits is intended to apply to government agencies only and not to commercial or not-for-profit organizations that are not government or semi-government bodies.
11. Channel 31 submits that it is not “established” under or by the *Corporations (Western Australia) Act 1990* (‘the Corporations Law’). Rather, it submits that it was established pursuant to, but not by, the Corporations Law, unlike the Western Australian Trotting Association (‘the WATA’), which is a body corporate constituted by s.3 of the *Western Australian Trotting Association Act 1946* and an agency for the purposes of the FOI Act. Channel 31 submits that its powers and functions are not conferred by statute and are essentially of a private commercial nature. Channel 31 submits that it was established for the benefit of sections of the public, but contends that this does not equate to being established for a public purpose. Channel 31 asserts that there is a distinction between a body being established for a purpose that has benefits to the public and a body being established for a public purpose. Channel 31 submits that it falls within the former category, that is, it was established for a purpose that has benefits to the public.

The complainant’s submissions

12. The complainant submits that Channel 31 is not a private, commercial broadcaster, but a public organization, funded by government as a loss-making venture with the majority of its income being derived from government agencies that provide general public education courses. The complainant submits that Channel 31 promotes itself as a station for all the community and that it is not in competition with commercial television channels and he referred me to various speeches made at the opening of Channel 31 on 18 June 1999, in support of his claims.

Relevant provisions of the *Interpretation Act 1984*

13. Section 5 of the *Interpretation Act 1984* (‘the Interpretation Act’) defines various terms that are applicable to the interpretation of the written laws of Western Australia. The term “written law” is defined in s.5 of that Act as meaning “...*all acts for the time being in force and all subsidiary legislation for the time being in force.*” Clearly, the Corporations Law is a written law as defined in the Interpretation Act.
14. The word “under” is defined in the Interpretation Act as follows:

“**“under”** in relation to a written law or a provision of a written law, includes “by”, “in accordance with”, “pursuant to” and “by virtue of”.”

15. Channel 31 submits that there is a distinction between a corporation being established under or by the Corporations Law, as opposed to a corporation being established pursuant to the Corporations Law. Channel 31 submits that, unlike the WATA, its powers and functions are not conferred by statute. I understand that submission to mean that Channel 31 contends that, because it is not established directly under its own legislation (unlike the WATA), it cannot be said that Channel 31 is established under the Corporations Law.
16. My inquiries have established that Channel 31 is a company limited by guarantee and registered under the Corporations Law. Section 119 of the Corporations Law states that a company comes into existence as a body corporate at the beginning of the day on which it is registered. Based upon the material before me, I am satisfied that Channel 31 did not exist as a legal entity until it was registered under the Corporations Law. In other words, I consider Channel 31 was established under, or pursuant to, a written law, namely the Corporations Law on the day that it was registered as a company. The next question is whether Channel 31 was established for a public purpose.

Public purpose

17. The term “public purpose” has been discussed in a number of decisions of various courts. The High Court of Australia considered that an organization can be said to have been set up for a public purpose if the organization is intended to benefit the public as a whole, or a substantial section of the public, provided that the organization has not been set up for a private purpose such as the private profit or advantage of an individual or class of individuals: *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315.
18. In the context of FOI legislation, the Queensland Information Commissioner in *Re English and Queensland Law Society Incorporated* (1995) 2 QAR 714, considered the meaning of the words “public” and “purpose” in the equivalent provision of the Queensland FOI Act. In *Re English*, the Queensland Information Commissioner considered the meaning of the words “public” and “purpose” in the context of a body directly established by, and having its powers, functions and duties conferred on it by, a statute and said, at paragraph 74 on p.735:

“The word “purpose” directs attention to the objects or aims for which a body has been established as evidenced by the relevant powers, functions or duties conferred on it by Parliament. The word “public” imposes a requirement that a purpose be one for the benefit of members of the community generally (or a substantial segment of them, eg those who have dealings with solicitors).”

19. In *Re English*, the Queensland Information Commissioner also considered, at paragraph 78 on p.736, that the use of the word “a” in the phrase “for a public purpose” had the effect of requiring that at least one of the major purposes for the establishment of the body (as distinct from minor or ancillary purposes) must be a public purpose. The decision in *Re English* was subsequently confirmed by the Supreme Court of Queensland in *Queensland Law Society Inc v Albeitz* (1996) 2 Qd R 580.

20. In *Re McNeill and Western Australian Trotting Association* [1996] WAICmr 20, I accepted that statement to be the correct test in Western Australia where the same words “established for a public purpose” are used in the definition of “public body or office” in the FOI Act. I also said in *Re McNeill*, that it is not necessary that all of the purposes for which a body has been established be characterised as public in nature in order for the body to fall within that definition.

The purpose for which Channel 31 was established

21. I understand that a private consortium owns Channel 31. That consortium includes The University of Western Australia, Edith Cowan University, Curtin University of Technology, the WATA, and the State Government, through Westlink. Each of those bodies is an agency to which the FOI Act applies.
22. I have examined the Memorandum and Articles of Association of Channel 31. The objects for which Channel 31 is established are set out in Clause 2 of the Memorandum of Association, as follows:

“(a) To advocate for, apply for and to accept grants of licences to operate community education television and broadcasting stations within the Commonwealth of Australia and from time to time to apply for, obtain, accepts grants of, purchase, acquire, transfer, takeover, hire, lease, dispose of, deal in and otherwise turn to account any licences, order, consents, permits, rights, options or concessions whatsoever relating to or in any way connected with community educational television pursuant to or in accordance with or under and by virtue of the Broadcast Services Act 1992 as amended and any statutory modification thereof or any statutory provision substituted therefor.

(b) To undertake, carry on and conduct the business of proprietors and operators of community educational television stations, transmitting and receiving stations...in any way connected with community educational television, broadcasting, transmission and receiving and any other means of visual and/or sound transmission and receiving of whatsoever nature or kind.”

23. Channel 31 operates a community educational television and broadcasting station, pursuant to a community broadcasting licence issued under the *Broadcast Services Act 1992* (Commonwealth). I understand that community broadcasters differ substantially from commercial and national broadcasters in that they have a local focus and role in attracting community participation in broadcasting. I also understand that community participation in broadcasting is a crucial element that must be satisfied in order to qualify for the grant of a community broadcasting licence by the Australian Broadcasting Authority. It is my understanding that such licences are only issued for broadcasting services that are provided for community purposes; that are not operated for profit or as part of a profit-making enterprise; that provide programs that are able to be received by commonly available equipment; and that are available free to the general public.

24. Channel 31 broadcasts its programmes on behalf of local community groups, as well as on behalf of educational institutions, including Edith Cowan University, The University of Western Australia and Curtin University. It is my understanding that its programs are broadcast free to air, and include educational material, featured productions, coverage of public and local events, and the work of students in the Media courses conducted by Curtin University. In my opinion, Channel 31 broadcasts a variety of local programs that are of interest to a wide section of the community.
25. I have examined the financial report for Channel 31 for the year ended 30 June 2000. That report states that the principal activities of Channel 31 are that of holding a licence for, and the operation of, a public broadcasting station with a weekly audience of approximately 200,000 viewers. That financial report also states that Channel 31 is a not-for-profit organisation and I understand that it derives its income from advertising and sponsorship, which is then reinvested in its programming activities.
26. In my opinion, the stated objects for which Channel 31 is established are public educational purposes, not private commercial purposes. The establishment and operation of a broad-based community educational television station, with active community participation in those operations can, in my view, clearly be seen to be for the benefit of the public of Western Australia generally, or for a substantial segment of the public. I also consider benefits flow to the relevant tertiary institutions, which are also established for public purposes, and to the students of those participating tertiary institutions.
27. Having regard to the Memorandum and Articles of Association, I consider that the stated objects of Channel 31, which include obtaining a community broadcasting licence and operating a broad based community educational television station with tertiary institution and community participation, are public purposes which benefit the public of Western Australia as a whole, or at least a substantial segment of the public. On that basis, I am satisfied that Channel 31 is established for one or more public purposes.
28. Finally, I have considered the submissions made by Channel 31 that the Parliament of Western Australia did not intend the FOI Act to apply to commercial or not-for-profit organizations that are not government or semi-government bodies and that the term “public body or office” should be construed narrowly. I do not accept those submissions.
29. The intention of the Parliament that enacts a statute is to be found by an examination of the language of the relevant statute as a whole (see: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. The general right of access conferred by s.10(1) of the FOI Act is clearly and unambiguously expressed as a right to be given access to the documents of an agency, as defined in the Glossary in Schedule 2 to FOI Act. In my opinion, it is clear that Parliament intended the Act to apply to a public body or office as defined in the Glossary. As a matter of statutory interpretation, any body, whether it be a government or semi-government, commercial or not-for-profit organization that falls within the meaning of the term will be caught by the legislation.
30. With regard to the submission that the term “public body or office” is to be construed narrowly, I note that in the recent unreported case of *Minister for Transport v Edwards*

[2000] WASCA 349, His Honour Hasluck J, observed at p.12, that s.18 of the Interpretation Act requires preference to be given to the construction of a written law that would promote the purpose or object underlying the written law to a construction that would not promote that object. Hasluck J also stated “...where the objects of the FOI Act can be met, there is no reason to adopt a restrictive approach of the relevant provisions.” In line with Hasluck J’s observations, I do not see any good reason to construe the definition of the term “public body or office” in the manner suggested by Channel 31.

31. Accordingly, for the reasons given, I find that Channel 31 is an agency as defined in the FOI Act.
