

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

**File Ref: F2001083
Decision Ref: D0272001**

Participants:

Gordon Walliss Inglis
Complainant

- and -

Curtin University of Technology
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – whether the requested documents are documents of an agency – clause 4(1) of the Glossary in Schedule 2 – whether documents are in the possession or under the control of the agency – entitlement to access.

Freedom of Information Act 1992 (WA) s. 10; Glossary; Schedule 2, clause 4(1)
Corporations Law of Western Australia ss.181, 182 and 183

Minister for Transport v Edwards [2000] WASCA 349

Information Commissioner for Western Australia v Ministry of Justice [2001] WASC 3

Re Horesh and Ministry of Education (1986) 1 VAR 143

Beesley v Australian Federal Police [2001] FCA 836

Re Healy and The Australian National University (unreported, Commonwealth Administrative Appeals Tribunal, 23 May 1985)

DECISION

The decision of the agency is confirmed. The requested documents are not documents of the agency and the complainant has no right of access under the *Freedom of Information Act 1992* to those documents.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9 August 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by Curtin University of Technology ('the agency') to refuse Mr Inglis ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In May 2001, the complainant applied to the agency, under the FOI Act, for access to certain documents, including minutes of meetings of the Board of Management of Channel 31 Community Educational Television Limited ('Channel 31'). Channel 31 is a free-to-air television channel owned by a private consortium that includes the agency, Edith Cowan University ('ECU'), The University of Western Australia ('UWA') and the State government. In his access application, the complainant applied for access to certain documents held by the agency or which were obtainable by the agency in its role as a consortium member of Channel 31.
3. Following receipt of the complainant's access application, searches for the requested documents were undertaken by the agency's Records and Archives Office and inquiries were made with the Deputy Vice Chancellor, Teaching and Learning ('the Deputy Vice Chancellor'), who is the agency's appointee to the Board of Management of Channel 31 ('the Board') and, thus, a director of Channel 31. By letter dated 18 June 2001, the agency refused the complainant access to the requested documents, pursuant to section 23(1)(b) of the FOI Act, on the ground that the requested documents are not documents of the agency. The agency's decision on access was confirmed on internal review and, on 28 June 2001, the complainant made a complaint to the Information Commissioner seeking external review of the agency's decision on access.

REVIEW BY THE INFORMATION COMMISSIONER

4. When he lodged this complaint, the complainant provided me with a written submission in support of his application for external review, outlining the reasons why he considered that the requested documents are documents of the agency and, therefore, subject to the access provisions of the FOI Act.
5. I required the agency to produce to me, for my examination, the original of the FOI file maintained in relation to the complainant's access application. In addition, having considered the agency's notices of decisions and the complainant's submissions in support of his application for external review, I also required the agency to provide me with additional information about the Deputy Vice Chancellor's role as a director of Channel 31 and the relationship between the agency and Channel 31.
6. Thereafter, on 24 July 2001, I informed the parties, in writing, of my preliminary view of this complaint, including my reasons. It was my preliminary view, on the basis of the material then before me, that:

- (a) the agency did not have possession or control of the requested documents;
 - (b) any Channel 31 documents held by the Deputy Vice Chancellor were held by him in his capacity as a director of Channel 31 and not in his capacity as an officer of the agency; and
 - (c) the requested documents are not documents of the agency for the purposes of clause 4(1) of the Glossary in Schedule 2 to the FOI Act.
7. I invited the complainant to either withdraw his complaint or to provide me with further relevant submissions. I received a further submission from him on 1 August 2001. In those submissions, the complainant did not appear to dispute my preliminary view that the agency does not have possession or control of the requested documents and he made no submissions to me on that point. However, the complainant maintains his claim that any of the requested documents held by the Deputy Vice Chancellor, or which are obtainable by him from Channel 31, are held by him in his capacity as an officer of the agency and are, therefore, documents of the agency within the meaning of the FOI Act.

THE REQUESTED DOCUMENTS

8. The complainant seeks access to 12 different categories of documents relating to his business dealings with Channel 31, including extracts from the Channel 31 Board minutes relevant to those dealings, file notes, memoranda, correspondence and copies of videotapes and audiotape recordings.

DOCUMENTS OF AN AGENCY

9. The right of access provided by section 10 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 provisions of the FOI Act*”. The phrase “Documents of an agency” is defined in clause 4(1) of the Glossary in Schedule 2 to the FOI Act, as follows:

“Subject to subclause (2), a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.”

The complainant’s submissions

10. The complainant submitted that the requested documents are in the possession of the Deputy Vice Chancellor or, in the alternative, that the requested documents are obtainable from Channel 31 by the Deputy Vice Chancellor, in his capacity as the agency’s nominee director of Channel 31. The complainant also submitted that, as the agency is listed as a subscriber to the Memorandum of Association of Channel 31 (‘the Memorandum’), the requested documents are obtainable by the agency as a consortium member of Channel 31 and that

the agency and other consortium members “...have responsibility and hold liability for all board decisions and the conduct of Channel 31”.

11. The complainant further submitted that the Deputy Vice Chancellor was appointed to the Board by the agency, in order to secure the agency’s interests in Channel 31; that he attends meetings of the Board during business hours, in his capacity as the agency’s appointee; and that he performs duties as a director of Channel 31 whilst also performing duties as an employee or officer of the agency. The complainant contends that, because the Deputy Vice Chancellor’s duties as a director of Channel 31 are being funded by the taxpayer, the Deputy Vice Chancellor cannot be said to be acting in a private capacity as a director of Channel 31, as was claimed by the agency. Accordingly, the complainant submitted that any Channel 31 documents held by the Deputy Vice Chancellor or which are obtainable by him from Channel 31 (in his capacity as both a director of Channel 31 and as the agency’s appointee to Channel 31) are documents of the agency within the meaning of the FOI Act and, therefore, subject to the access provisions of the FOI Act.
12. In response to my preliminary view, the complainant submits that the Deputy Vice Chancellor is acting in a dual capacity, both as an officer of the agency and as a director of Channel 31. The complainant submits that “(a) *servant must give first duty to his employer, a director must give duty to his company.*” The complainant submits that, in the circumstances of this matter, there is a conflict of interest between the Deputy Vice Chancellor’s duties as an officer of the agency and his duties as a director of Channel 31. The complainant contends that there must be a legally overriding duty where such a conflict arises and, in this instance, the Deputy Vice Chancellor’s legally overriding duty is to the agency, as his employer, and not to the corporation of which he is a director, Channel 31.

The agency’s submissions

13. The agency submits that Channel 31 is an unlisted public company, limited by guarantee; that the Deputy Vice Chancellor owes a duty of directorship to Channel 31 only; that the Deputy Vice Chancellor, in his capacity as a director of Channel 31, has no formal reporting responsibilities to the agency and that he is not required to, and does not, submit a report to the Council of the agency or to any of the agency’s committees. The agency informs me that the Deputy Vice Chancellor’s membership of the Board does not form part of his position description as Deputy Vice Chancellor, Teaching and Learning. The agency’s submission is that the Deputy Vice Chancellor’s status as a director of Channel 31 is clearly distinguishable from his position as an officer of the agency and that any Channel 31 documents held by the Deputy Vice Chancellor are held by him in his capacity as a director of Channel 31 and not in his capacity as an officer of the agency.
14. The agency further submits that, although it is a subscriber to the Memorandum and a member of the company, as set out in the Articles of Association of Channel 31 (‘the Articles’), it does not have the right to inspect or have access to the documents or books of Channel 31. Although the agency holds various

files containing documents relating to the establishment of Channel 31, the originals of which I have inspected, none of those documents falls within the scope of the complainant's access application. Accordingly, the agency maintains its claim that the requested documents are not documents of the agency within the meaning of the FOI Act.

Consideration

15. Two questions arise for my consideration in this matter. The first question is whether the requested documents are in the possession or under the control of the agency (including whether the agency has an entitlement to access) and, thus, documents of an agency within the meaning of the FOI Act. If the answer to the first question is in the negative, then the second question is whether the requested documents are in the possession or under the control of an officer of the agency (the Deputy Vice Chancellor), in his capacity as an officer of the agency and, thus, documents of an agency within the meaning of the FOI Act.
16. In *Minister for Transport v Edwards* [2000] WASCA 349, Hasluck J noted, at paragraph 53, that the definition of the phrase "documents of an agency" in the Glossary to the FOI Act makes it clear that the definition is not a reference to ownership or authorship of a document, or to any entitlement to exclusive possession. It is simply a reference to documents in the possession or under the control of the agency, including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer. Accordingly, in my view, there must be "possession" in the sense of either actual holding of the requested documents, or some degree of control that is able to be exercised over the documents (see *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3).
17. Having examined the agency's files relating to the establishment of Channel 31, and having considered the submissions made to me by the parties, I am satisfied that the agency does not have possession of the requested documents, in the sense that it does not physically hold any of those documents in its records system. Further, as I noted at paragraph 7 above, the complainant does not appear to claim that the agency has physical possession of the requested documents and he has made no submissions to me to that effect. Accordingly, I find that the agency does not have physical possession of the requested documents.
18. In light of the agency's claim that it does not have a right of access to Channel 31's documents or books, although it is a member of Channel 31, I have also considered whether the requested documents are under the control of the agency, in order to determine whether the agency may have a right of access to the requested documents on the basis of a legal right to possession or constructive possession of the documents: see, for example, the decision of the Federal Court of Australia in *Beesley v Australian Federal Police* [2001] FCA 836, in which Beaumont J considered the concept of constructive possession. In other words, are the requested documents under the control of the agency because the agency is entitled to access them?

19. I have examined Channel 31's Memorandum and Articles. Clause 5 of the Articles provides that the subscribers to the Memorandum shall be members of Channel 31. Clause 60 of the Articles further provides that the Board of Channel 31 shall determine when, where and under what conditions the records of the company shall be open to the inspection of members and that no right of inspection is conferred other than in accordance with, amongst other things, clause 7 of the Memorandum, which refers to the keeping and inspection of the accounts of Channel 31.
20. Having examined clause 60 of the Articles and clause 7 of the Memorandum, I consider that the agency's right to inspect the accounts of the company and documents of a like nature is contingent upon the Board approving such an inspection. In those circumstances, it is clear that the agency, as a member of Channel 31, has no immediate and direct right of access to such documents.
21. Moreover, the agency's contingent right of access does not, of itself, create any right of access to documents of the kind requested by the complainant, being Board minutes, file notes, memoranda, correspondence and copies of videotapes and audiotape recordings relating to the complainant's business dealings with Channel 31. Having examined the Memorandum, the Articles and the relevant provisions of the *Corporations Law of Western Australia*, I have been unable to identify any provisions in those documents or the statute, which gives any member of Channel 31 (including the agency) a legally enforceable right, direct or indirect, to inspect or take copies of the minutes of Board meetings and the other requested documents or, in the alternative, to require Channel 31 to provide the agency with copies of such documents.
22. In my view, the agency does not have an immediate, legally enforceable right to require Channel 31 to provide it with copies of the requested documents under the *Corporations Law of Western Australia*, the Memorandum or the Articles and, accordingly, I find that the requested documents are not under the agency's control.
23. The second question to be considered is whether the requested documents are in the possession or under the control of the Deputy Vice Chancellor, in his capacity as an officer of the agency and, therefore, are documents of an agency within the meaning of the FOI Act.
24. The complainant submits that the Deputy Vice Chancellor is not acting in a private capacity as a director of Channel 31 but, rather, attends Board meetings during business hours, whilst he is being paid as an officer of the agency. The complainant submits that the Deputy Vice Chancellor's overriding duty is to the agency and not to Channel 31 and, accordingly, he holds Channel 31 documents in his capacity as an officer of the agency. Conversely, the agency submits, for the reasons set out in paragraph 13 above, that the Deputy Vice Chancellor owes a duty of directorship to Channel 31 only. The Vice Chancellor of the agency has advised me that he has not instructed the Deputy Vice Chancellor to make any Channel 31 documents held by the Deputy Vice Chancellor available

to him, because the Deputy Vice Chancellor holds those documents in his capacity as a director of Channel 31.

25. The statutory duties of directors of public companies are set out in the *Corporations Law of Western Australia* and include the duty of directors to exercise their powers and discharge their duties in good faith, in the best interests of the corporation (in this case, Channel 31) and for a proper purpose (s.181); the duty not to use their positions improperly to gain an advantage for themselves or for someone else (s.182); and the duty not to use any information obtained from their position as directors to gain an advantage for themselves or someone else (s.183). In addition, other laws, including the general common law, impose certain fiduciary duties upon directors, including the duty to act *bona fide* in the best interests of the company as a whole; the duty to exercise their powers as directors for proper purposes; the duty to avoid conflicts of interest and the duty to exercise due care, diligence and skill in the exercise of their duties as directors.
26. Having regard to the statutory and common law duties of directors of public companies, and on the basis of the material before me, I accept the agency's submission that the Deputy Vice Chancellor, when acting as a director of Channel 31, is not acting in his capacity as an officer of the agency. I also consider that the Vice Chancellor of the agency is not required or entitled to ask the Deputy Vice Chancellor to provide him with any Channel 31 documents, which the Deputy Vice Chancellor holds in his capacity as a director of Channel 31, in order to decide whether or not the agency may give access to such documents under the FOI Act. To do so may, in my view, have the effect of requiring the Deputy Vice Chancellor to breach one or more of his statutory duties as a director under the *Corporations Law of Western Australia* and his common law duties as a director of Channel 31, or both.
27. I do not accept the complainant's submission that, because the Deputy Vice Chancellor undertakes his duties as a director of Channel 31 during business hours whilst being paid as an officer of the agency, he cannot be said to be acting in an independent capacity. Many officers of agencies sit in an independent capacity on external committees or do work for professional associations in business hours, sanctioned by their employers. I also do not accept the complainant's submission that, in this instance, the Deputy Vice Chancellor has "*a legally overriding duty*" to his employer, the agency, and not to Channel 31. In my opinion, the statutory duties of directors of public companies, prescribed by the *Corporations Law of Western Australia*, and the fiduciary duties imposed upon directors by the common law, establish that, in his capacity as a director of Channel 31, the Deputy Vice Chancellor owes his duty to the corporation of which he is a director, Channel 31, and not otherwise.
28. The complainant's submissions on this aspect of the matter are unsupported by any probative material or legal authority which establishes that a director of a public company, who is also an officer of an agency, owes a legal duty to that agency, which overrides that person's clear statutory and common law duties to the corporation of which he or she is a director. Accordingly, I do not accept that submission.

29. Finally, decisions in other jurisdictions in Australia where FOI legislation has been in force for some time, clearly indicate that circumstances may arise in which documents held by an officer of an agency are held by that officer in a private capacity and are not documents that he or she has a duty, as an employee of an agency, to keep: see, for example, *Re Healy and The Australian National University* (unreported, Commonwealth Administrative Appeals Tribunal, 23 May 1985). Similarly, documents brought into existence for a purpose other than an administrative or other relevant purpose of the agency, and which are not in the agency's control or located within the agency's record system, are not documents in the possession of the agency: see *Re Horesh and Ministry of Education* (1986) 1 VAR 143.
30. In view of the above, I find that any Channel 31 documents, which are in the possession or under the control of the Deputy Vice Chancellor of the agency, are in his possession or under his control in his capacity as a director of Channel 31 and not in his capacity as an officer of the agency. Accordingly, I also find that any Channel 31 documents in the possession or under the control of the Deputy Vice Chancellor are not documents of the agency within the meaning of clause 4(1) of the Glossary in Schedule 2 to the FOI Act.
31. In summary, I am satisfied that the agency does not have the requested documents in its possession or under its control. Accordingly, I find that the requested documents are not documents of the agency for the purposes of the definition in clause 4(1) of the Glossary to the FOI Act and the complainant has no right of access to those documents.
