

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

**File Ref: F1471998
Decision Ref: D0251999**

Participants:

West Australian Newspapers Limited
Complainant

- and -

**Tertiary Institutions Service Centre
Incorporated**
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* – Glossary – meaning of “agency” – meaning of “public body or office” – refusal to deal with an access application.

Freedom of Information Act 1992 (WA) ss. 10, 13, 66(6); Glossary.

Associations Incorporation Act 1895.

Associations Incorporation Act 1987 Schedule 2 Clause 1.

Interpretation Act 1984 ss 3(1)(b), 5.

University of Western Australia Act 1911 ss.3, 6, 13.

Murdoch University Act 1973 ss. 4, 5.

Western Australian Institute of Technology Act 1966 ss. 5, 7.

Teacher Education Act 1972 ss. 6, 8.

McNeill and Western Australian Trotting Association [1996] WAICmr 20.

Re Christie and Queensland Development Corporation (1993) 1 QAR 1.

Re Adams and the Tax Agents Board (1976) 1 ALD 251.

Thompson v Federal Commissioner of Taxation (1959) 102 CLR 315.

Re English and Queensland Law Society Incorporated (1995) 2 QAR 714.

Bryce v Curtis (1983) 51 ALR 73.

Renmark Hotel Incorporated v Federal Commissioner for Taxation (1949) 79 CLR 10.

Sutton and Another v Sharp and Others (IRCA No. 409/95, 24 August 1995, unreported).

DECISION

It is decided that:

- (a) the respondent is an agency for the purposes of the *Freedom of Information Act 1992*; and
- (b) the Information Commissioner has jurisdiction under Part 4 of the *Freedom of Information Act 1992* to deal with the complainant's complaint and conduct an external review of the respondent's decision to refuse the complainant access to documents.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9 August 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner of a decision made by the Tertiary Institutions Service Centre Inc ('TISC') to refuse to deal with an application for access to documents made under the *Freedom of Information Act 1992* ('the FOI Act'). The access application was lodged by West Australian Newspapers Limited ('the complainant'). TISC claims that it is not an "agency" as defined in the FOI Act and that, therefore, it is not subject to the provisions of the FOI Act.
2. In September 1998, the complainant made an application to TISC for access to documents that would reveal information about the number of students from each school who sat for the Tertiary Entrance Examinations in 1997 in four or more subjects and who were subsequently placed in the first 25% and the second 25% of students for eligibility to enrol at Curtin University.
3. TISC refused to deal with the access application on the ground that it is an incorporated association and not a public body or office as defined in the Glossary in Schedule 2 to the FOI Act. On 20 October 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the decision made by TISC that it is not an "agency" under the FOI Act.

Jurisdiction of the Information Commissioner

4. In the course of my dealing with this complaint, TISC raised the question of the jurisdiction of the Information Commissioner to investigate and review a decision made by it that TISC is not subject to the provisions of the FOI Act. Essentially the argument is that, if TISC is not an agency as defined in the FOI Act, then the provisions of the FOI Act do not apply to it; there is no right of access to its documents; and I do not have jurisdiction to review its decision to refuse the complainant's access application.
5. I have jurisdiction to investigate and review decisions of agencies which to refuse to deal with access applications made under the FOI Act. The complainant applied to TISC purportedly under the FOI Act, clearly in the expectation that TISC is amenable to its provisions, for access to documents. If TISC is an agency for the purposes of the FOI Act, then clearly an access application has been made and refused and the statutory rights of review arise, including external review by the Information Commissioner.
6. In *McNeill and Western Australian Trotting Association* [1996] WAICmr 20, the Acting Information Commissioner considered the question of the extent of the Information Commissioner's power to determine questions as to her own jurisdiction. The Acting Information Commissioner referred to and endorsed the decision of the Queensland Information Commissioner in *Re Christie and Queensland Development Corporation* (1993) 1 QAR 1.

7. In that case, the Queensland Information Commissioner referred to, *inter alia*, a passage in *Re Adams and the Tax Agents Board* (1976) 1 ALD 251 in which Brennan J said, at p. 254, that:

“An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority...”

8. In *Re Christie*, the Queensland Information Commissioner concluded, at paragraph 13 on p.6, that it is well established law that an appeal tribunal of limited jurisdiction has both the power, and a duty, to embark upon a consideration of issues relating to the limits of its jurisdiction, when they are raised as an issue in an appeal lodged with the tribunal. I agree with that view.
9. Clearly, upon complaint, and where it is in issue, I am required to determine whether the body or office concerned is an “agency” for the purposes of the FOI Act, in order to form a view as to whether or not I have jurisdiction to deal with the complaint and review the decision. In this matter, the preliminary question, therefore, is whether TISC is an agency, as defined in the FOI Act.

The relevant provisions in the FOI Act.

10. Section 10(1) of the FOI Act provides that a person has 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 the Glossary in Schedule 2 of the FOI Act to mean, among other things, a public body or office.
11. The term “*public body or office*” is defined to mean:
- “(a) *a department of the Public Service;*
 - “(b) *an organisation 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)."*

12. Clearly, TISC is not a body referred to in paragraphs (a), (b), (c), (d) or (g) of the definition. Based on the material before me, I am also satisfied that it is not a body described in paragraph (f) of that definition. The question is whether TISC is a body or office that is established for a public purpose under a written law as specified in paragraph (e) of the definition.
13. In my view, it is clear that TISC is a body rather than an office for the purpose of paragraph (e) in the definition of "public body or office". In the circumstances of this complaint, the questions are whether it was established for a public purpose and whether it was established under a written law.

The submissions of TISC

14. Initially, I sought information from TISC about its establishment, purpose and structure. I am informed by TISC as follows:
- In July 1973, a management committee composed of delegates from the University of Western Australia ('UWA'), the then Western Australian Institute of Technology ('WAIT'), the Western Australian Teacher Education Authority ('WATEA') and Murdoch University ('Murdoch') was formed to administer a Joint Application Centre;
 - The JAC was established to service UWA, WAIT, WATEA and Murdoch by centralising the processing of applications for admission to enter courses offered by those institutions;
 - On 10 December 1975, TISC was established by agreement between the participating tertiary institutions;
 - TISC took over the functions of the JAC, as well as the conduct of the Tertiary Admissions Examination ('the TAE'), which had previously been conducted by the Public Examinations Board of the UWA;
 - The conduct of the TAE was transferred to the Secondary Education Authority (now the Curriculum Council) in 1985;
 - TISC was incorporated on 20 June 1984, due to concerns about the legal liability of its participants;
 - TISC does not hold any licences to carry out its functions; and
 - The members of TISC are the UWA, Curtin University of Technology ('Curtin'), Edith Cowan University ('Edith Cowan') and Murdoch.
15. TISC also informed me that it is a service organisation, established to provide services to UWA, Curtin, Edith Cowan and Murdoch. The objects of TISC are to process applications for admission to the universities; to enhance and

facilitate interest and participation in higher education in Western Australia; and to do all such acts, matters and things and to carry out such other functions as the Management Committee of TISC deems desirable to further the objects of TISC and the common interests of its member institutions.

16. I understand that TISC also conducts specially designed tests, known as the Special Tertiary Admissions Test ('the STAT'); administers the Western Australian Universities Foundation Program, and provides support for the processing of applications to the Residential Colleges of the UWA.

Public purpose

17. The concept of what is a "public purpose" has been considered in a number of decisions in various courts. The High Court of Australia considered a public purpose to be one that benefits the public as a whole or a substantial section of the public provided that the organisation has not been set up for a private purpose like private profit: *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315. 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. The Queensland Information Commissioner – in the context of considering a body directly established by, and having its powers, functions and duties conferred on it, by a statute - 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)."

18. The Queensland Information Commissioner also considered, at paragraph 78 on p.736, the use of the word "a" in the phrase "for a public purpose". He found that it had the effect of requiring "...at least one of the major purposes for its establishment (as distinct from minor or ancillary purposes)" to be "a public purpose". I agree with the view taken by the Queensland Information Commissioner.
19. TISC informs me that its objects are to process applications for admission to the four universities; to enhance and facilitate interest and participation in higher education in Western Australia; and to do all such acts, matters and things and carry out such other functions as the Management Committee deems desirable to further those objects and the common interests of its member institutions.
20. The documents before me indicate that the joint applications processing system operated by TISC is designed to benefit the four universities and persons seeking admission to those institutions. Prospective students need only submit one application which covers the four universities, thus avoiding the need for

separate applications to be lodged at each institution for admission to its courses.

21. However, TISC submits that the latter outcome is not the purpose for which it was established. One object of TISC, added after it had been established, is to enhance and facilitate interest and participation in higher education in Western Australia. However, I am advised that the purpose of that particular object is to provide TISC with the authority to encourage potential applicants to apply to university so that the universities have a large number of potentially more capable applicants from which to select their students.
22. TISC acknowledges that in the long term there is a benefit to the community in the form of university graduates, but submits that the establishment of TISC and its objects were for the principal benefit of its member universities because they were relieved of the burden of conducting and duplicating separate selection activities. Accordingly, TISC claims that the purpose of its objects is to benefit member universities and not for public purposes.
23. I consider that the stated objects of TISC are for public purposes not private ones. The establishment of a central processing facility, a “one stop shop” for prospective university students, clearly delivers administrative and management efficiencies for the member universities which are themselves established for public purposes, namely, the provision of higher education facilities to the community at large. There is also a benefit flowing to a section of the community, the students and prospective students, from such an arrangement. Furthermore, the object of enhancing and facilitating interest and participation in higher education in Western Australia is clearly, in my view, a public purpose for the benefit of the State as a whole. On that basis, I am satisfied that TISC was established for a public purpose.

Established under a written law

24. It is clear to me that TISC was not established directly by specific legislation relating to that body and including such matters as its constitution, powers, functions and responsibilities. Rather, it was incorporated in 1984 under the *Associations Incorporation Act 1895* (‘the 1895 Act’). The 1895 Act has been repealed and replaced by the *Associations Incorporation Act 1987* (‘the Incorporation Act’). However, clause 1 of Schedule 2 to the Incorporation Act contains transitional provisions which provide, *inter alia*, that every association that was, immediately before the commencement of the Incorporation Act, an association incorporated under the 1895 Act, is deemed to be an association incorporated under the Incorporation Act. Accordingly, TISC is incorporated under the Incorporation Act.
25. The term “written law” is not defined in the FOI Act. However, that term is defined in s.5 of the *Interpretation Act 1984* to mean:

“...all Acts for the time being in force and all subsidiary legislation for the time being in force.”

An “Act” is also defined in s.5 of the *Interpretation Act 1984* to include an Act passed by the Parliament of Western Australia. It follows, therefore, that the Incorporation Act is a “written law”.

“established”

26. Although TISC was incorporated under a written law, there is authority that the incorporation of a body is not necessarily the same as its establishment. In *Bryce v Curtis* (1983) 51 ALR 73, Burt CJ said, at p.75:

“The primary meaning of the word “to constitute” is to establish. The primary meaning of the word “to incorporate” is to constitute as a legal artificial corporation. There may be a difference but it is not, I think, necessary for the purposes of these reasons to pursue that thought.”

27. In *Renmark Hotel Incorporated v Federal Commissioner for Taxation* (1949) 79 CLR 10, Rich J pursued the distinction in the context of considering income tax legislation and said, at p.19:

“...the word “constituted” is not the same as “incorporated”...it is conceivable that an unincorporated body may be constituted under a State Act...On the other hand, mere incorporation under an Act does not constitute the body.”

28. TISC claims that it is an incorporated body and, therefore, not subject to the FOI Act. I accept the argument that the mere fact of incorporation may not be sufficient to bring a body within the provisions of the FOI Act. If TISC were established on incorporation – that is, if it were established at the outset as an incorporated body under the Incorporation Act - then I would consider TISC to be established under that Act. Given the view that I have expressed above that TISC is a body established for a public purpose rather than a private one, I would therefore consider TISC to be an agency.
29. However, there is material before me that points to the fact that TISC existed and operated as a body prior to its incorporation. Although a body may be established as a body corporate at the outset and, therefore, arguably in my view, established by its incorporation, where an existing unincorporated body is subsequently incorporated, authority suggests that it was established when initially set up and not by its incorporation. When an existing association becomes a corporation upon registration it does not mean that a second entity is created; the association simply takes on corporate clothes: *Sutton and Another v Sharp and Others* (unreported, IRCA No.409/95, 24 August 1995). Therefore, a body or organisation that was in existence and operating before it became incorporated may have been established when it was first set up as an organisation and not upon its incorporation.
30. If TISC was not established upon incorporation, but was established at an earlier time, under a written law other than the Incorporation Act and for a public purpose, in my view it would nonetheless be an agency as defined and subject to the provisions of the FOI Act.

The history of TISC

31. I have been provided with a copy of a written agreement, dated 9 December 1975, ('the Agreement') executed between the WATEA, UWA, Murdoch and WAIT ('the founding institutions'). Under that Agreement, the founding institutions mutually agreed to set up TISC and they established and appointed a Management Committee to act as their intermediary to carry out the objects and service functions of TISC.
32. I have also obtained a copy of a deed of Indenture ('the Indenture'), dated 26 August 1980, relating to TISC. The parties to the Indenture were the UWA, WAIT, Murdoch and Churchlands, Claremont, Nedlands and Mount Lawley Colleges. Paragraph (a) of the Indenture acknowledges that the founding institutions previously set up TISC under the Agreement. Paragraph (b) of the Indenture states that the parties establish and re-appoint the Management Committee to act as their intermediary to carry out the objects and functions specified in the Indenture. The Indenture also states that the parties mutually agree that TISC would continue to operate, under the direction of the Management Committee, in accordance with the terms of the Indenture.
33. I have examined and compared the terms of the Agreement, the Indenture and the constitution of TISC. Based on that material, I am satisfied that, prior to incorporation in 1984, TISC existed for a number of years as a body for the same purpose and with almost identical objects to those following its incorporation.
34. Therefore, it is arguable that TISC was established prior to its incorporation when it was set up by agreement between the participating tertiary institutions and was not established upon its incorporation under the Incorporation Act. The question then is whether it was, at that time, established under a written law.
35. Section 5 of the *Interpretation Act 1984* defines "under" 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".
36. That definition suggests that to me that a body established either directly by or indirectly under a written law may be an agency for the purposes of the FOI Act. Further, it would seem that the expanded definition of "under" would apply unless the intent and object of the FOI Act or something in the subject or context of the FOI Act is inconsistent with such an application (s.3(1)(b) of the *Interpretation Act 1984*).
37. The documents produced to me indicate that, during 1972, the UWA and WAIT became aware of a need to establish a single, centralised organisation, dedicated specifically to the task of receiving and processing applications from new students seeking admission to undergraduate courses offered by those institutions. Subsequently, the UWA and WAIT agreed to conduct an informal joint admissions program for 1973 tertiary enrolments. In mid 1973, a

committee was established for that purpose and shortly afterwards, Murdoch and the WATEA were invited to participate on that committee and did so.

38. During 1974, the public examination system in WA was reviewed and the Tertiary Admission Examination was introduced to replace the Leaving and Matriculation certificate examinations that had previously been conducted by the Public Examinations Board of the UWA. The review of the public examination system occurred when the discussions about the proposed joint admissions centre were well advanced. Around the same time, it was recognised that other educational institutions should be involved in these processes and there also existed a need to provide additional services for students.
39. Subsequently, TISC was set up in December 1975 under the Agreement made between the founding institutions. The Agreement states, among other things, that the functions of TISC are to conduct the Tertiary Admission Examination in accordance with the policies of the Western Australian Tertiary Education Commission; to process applications for admission to undergraduate courses offered by the founding institutions; and to carry out such other service functions as were agreed by the founding institutions, from time to time. Under the Agreement, the founding institutions also established and appointed the Management Committee of TISC consisting of 2 representatives nominated by each of them. The Management Committee was to act as the intermediary of the founding institutions to carry out the objects and service functions for which TISC was created.
40. The terms of the Agreement establish the relationship between TISC and the founding institutions. TISC was established by the founding institutions as a service organisation, specifically for the purpose of carrying out functions previously performed separately by each of them. It had been recognised by the founding institutions that management efficiencies were to be gained by centralising and streamlining some of the administrative functions relating to undergraduate enrolments. The benefits of such a system had been evident from the informal joint admissions program operated by the UWA and WAIT in 1973. Consequently, TISC was created to formalise that process.
41. It is clear to me that each of the founding institutions is, or was, an agency for the purposes of the FOI Act. The UWA, Murdoch and WAIT (now Curtin) were each established directly by specific Acts of the Parliament of Western Australia: (see s.3 of the *University of Western Australia Act 1911*; s.4 of the *Murdoch University Act 1973*; and s.5(1) of the *Western Australian Institute of Technology Act 1966*. Further, the WATEA was established under s.6(1) of the *Teacher Education Act 1972* and it would, therefore, also be an agency for the purposes of the FOI Act.
42. Each of the founding institutions was established for public purposes including, *inter alia*, providing tertiary education courses and facilities for those members of the public of Western Australia undertaking tertiary education; for the advancement, development and practical application of knowledge in the various branches of science and technology; and to advance the prosperity and

welfare of the people of the State of Western Australia. (see s.5 of the *Murdoch University Act 1973*, the preamble of the *University of Western Australia Act 1911*; s.8 of the *Teacher Education Act 1972*; and s.7 of the *Western Australian Institute of Technology Act 1966*).

43. Section 6 of the *University of Western Australia Act 1911* established the UWA as a body corporate, with perpetual succession and a common seal. The *Murdoch University Act 1973*, the *Teacher Education Act 1972* and the *Western Australian Institute of Technology Act 1966* contain almost identical provisions.
44. Section 13 of the *University of Western Australia Act 1911* invests the governing authority of the UWA, the Senate, with the entire control and management of the affairs and concerns of the UWA and provides that the Senate may act in all matters concerning the UWA in such manner as appears to the Senate to best promote the interests of the UWA. Similar provisions appear in relation to the governing bodies of the other founding institutions.
45. The governing bodies of each of the founding institutions had the necessary statutory authority and power, as bodies corporate under their respective enactments, to enter into the Agreement. An examination of the terms of the Agreement indicates to me that the founding institutions did not establish TISC as a body separate and distinct from themselves, nor did they invest TISC with any of the powers, functions or duties that are invested in them by their respective enactments.
46. The authority and responsibility for managing the operations of TISC was not assigned to TISC but, rather, was assigned to the Management Committee of TISC. The terms of the Agreement invested the Management Committee with the responsibility for supervising the operations of TISC, without in any way affecting the autonomy of any of the founding Institutions (see clause 6). Clause 7 of the Agreement empowered the Management Committee to, among other things, select staff and to arrange for the provision of the facilities necessary for TISC to carry out its functions.
47. Under clause 8 of the Agreement, staff members of TISC were appointed by the UWA, as members of the administrative staff of the UWA, and subject to the statutes, rules and regulations of the UWA that applied to all other UWA administrative staff. Selected staff members were seconded to TISC to perform duties determined by the Management Committee of TISC. The Management Committee was composed of officers nominated by each of the founding institutions and it was responsible for reimbursing the UWA for all costs, including total staff costs, incurred by it in that respect.
48. Although the legislation relating to the WAIT, Murdoch and the WATEA empowered each of those bodies to delegate functions, powers and duties to officers of those bodies appointed to various committees, the *University of Western Australia Act 1911* contains no such power. It appears to me, therefore, that the form of the Agreement was necessary so that the founding institutions, especially the UWA, did not breach any of the statutory provisions of their respective acts.

49. The Agreement is formally executed under the seals of each of the founding institutions. Each of the founding institutions had the necessary statutory authority and power to create TISC. However, TISC did not have a legal identity separate from the founding Institutions. At all times it was subject to the direction and control of the Management Committee and its staff members were officers of the UWA. Funding for TISC was provided by the founding institutions from existing budgets.
50. Based on the history of this matter, I consider that TISC was established when each of the founding institutions executed the Agreement and affixed their common seals. It was established pursuant to the powers conferred on the founding institutions by their respective legislation. Therefore, I consider that TISC was established pursuant to or by virtue of the specific Acts of the Parliament of Western Australia relating to each of those agencies, namely, the *University of Western Australia Act 1911*, the *Murdoch University Act 1973*, the *Western Australian Institute of Technology Act 1966*, and the *Teacher Education Act 1972* which established the WATEA.
51. One of the objects of the FOI Act is to make persons and bodies that are responsible for State and local government more accountable to the public. If a State or local government body were to be established, not directly by its own legislation, but pursuant to or by virtue of other legislation, then in my view, it would not be inconsistent with the objects of the FOI Act that such a body should be subject to the provisions of the FOI Act. Further, I do not consider that it could have been intended by Parliament that government agencies would be able to establish separate bodies to assist them in the discharge of their functions in such a way that those separate bodies are not subject to the accountability mechanisms imposed by law on their parent bodies.
52. For those reasons, I consider that TISC was not established upon its incorporation in 1984. However, even it were established then, I am of the view that it would be an agency for the purposes of the FOI Act, being a body established for a public purpose under a written law, the Incorporation Act. Notwithstanding that, I consider that TISC was established for the public purposes stated in its constitution and it was established by the Agreement executed in 1975 (and varied by the Indenture signed in 1980) which was made pursuant to the legislation governing the operations of the founding institutions. Accordingly, I find that TISC is an agency for the purposes of the FOI Act.
53. I also find, therefore, that TISC is subject to the obligations placed on agencies by the FOI act. The complainant made a valid application for access to documents under the FOI Act and TISC was required by the FOI Act to deal with it in accordance with the provisions of that Act. Although the complainant did not apply for internal review of TISC's decision to refuse access to documents, which is generally required before a complaint may be made, there clearly would have been nothing to be gained by requiring the complainant to do so, given the firm stand taken by TISC in this matter. Therefore, I consider this to be a matter in which cause has been shown why internal review should not be applied for and I am prepared to exercise my discretion under s.66(6) and allow the complaint to be made.

54. Therefore, I find that I have jurisdiction to deal with the complaint and conduct an external review of TISC's decision to refuse the complainant access to documents. I shall contact the parties with directions as to the further conduct of the review proceedings.
