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Decision and Reasons for Decision

Application Number: 2006/F0192

Applicant: LTR

Respondent: WorkCover Queensland

Decision Date: 28 March 2007

Catchwords: Section 53 and 54E of the FOI Act – Amendment of information – whether information is inaccurate or misleading

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Reasons for Decision

Background

1. The applicant applied to WorkCover Queensland (WorkCover), by letter dated 27 February 2006, to have two documents held by WorkCover amended pursuant to section 53 of the *Freedom of Information Act 1992* (Qld) (FOI Act).
2. The documents the applicant sought to have amended were:
 - a complaint summary prepared by WorkCover in January 2005 in response to a complaint made by the applicant into the handling of his WorkCover claim (the Complaint Summary)
 - a letter from WorkCover to a factual investigator dated 10 October 2002 relating to the investigation of the applicant's WorkCover claim (the Letter).
3. The applicant claimed the following statements contained in the Complaint Summary were inaccurate and misleading:

LTR put forward five potential witnesses. Of these five witnesses, three provided statements that did not support LTR's claims. One declined to provide a statement and one could not be located as he was no longer in the employ of GHR. (Statement One)

and

WorkCover has spent a significant amount of time investigating LTR's complaints regarding our investigation of his claim. (Statement Two)

4. The Letter contained a list of five people under a heading '*Witnesses nominated by the Worker*'. The applicant contended that this was incorrect and that he had only nominated three witnesses that would support his claims.
5. WorkCover did not make a decision on the applicant's application, and in accordance with section 57(2) of the FOI Act, it was taken to have made a decision refusing to amend the information.
6. The applicant applied to this office on 19 April 2006 for external review of WorkCover's deemed refusal to amend the documents.

Steps taken in the external review process

7. Following receipt of the external review application, staff of this office attempted to resolve the matter informally through consultation with both parties. Where appropriate, possible amendments to the documents (including the addition of notations) were submitted by both parties and given due consideration by this office and the other party.
8. On 7 December 2006 I provided the applicant with my preliminary view as to the most appropriate amendments and the form these amendments should take. The applicant provided this office with submissions in response to my preliminary view on 21 December 2006. In addition, staff of this office met with Ms Paula Pyburne of WorkCover to discuss my preliminary view and the applicant's submissions on 16 January 2007. Ms Pyburne made a number of oral submissions at this time. My preliminary view was further provided to WorkCover by email dated 9 February 2007,

and WorkCover submitted a written response by facsimile on 16 February 2007. WorkCover's written submissions were provided to the applicant who responded by letter dated 19 March 2007.

9. Ultimately, this attempt at an informal resolution was unsuccessful. In making this decision I have taken into account the following information:

- the applicant's initial FOI access application dated 27 February 2006
- the applicant's application for external review dated 19 April 2006
- the Letter
- the Complaint Summary
- page 12 of a statement of LTR taken by psychologist, Marie O'Dea dated 23 September 2002 (signed 25 September 2002)
- a list of involved persons provided to Marie O'Dea by LTR
- WorkCover file notes for LTR's claim
- page 3 of a document entitled 'Confidential Report' dated 20 November 2002 regarding LTR's WorkCover claim
- written submissions made by WorkCover to this office dated 7 August 2006 and 16 February 2007
- written submissions made by LTR to this office dated 28 August 2006, 21 December 2006 and 19 March 2007
- verbal submissions made by WorkCover to staff of this office on 1 December 2006, 9 January 2007, 16 January 2007 and 5 February 2007
- the relevant provisions of the FOI Act and previous decisions of the Information Commissioner.

Sections 53, 54E and 55 of the FOI Act

10. Section 53 of the FOI Act provides:

53 Person may apply for amendment of information

- (1) *A person who has had access to a document from an agency or Minister (whether or not under this Act) containing information relating to the person's personal affairs is entitled to apply to the agency or Minister for amendment of any part of the information that the person claims is inaccurate, incomplete, out-of-date or misleading.*

11. Section 54E of the FOI Act provides:

54E Discretion to amend information

- (1) *An agency or Minister to whom an application is made under section 53 may decide to amend the information to which the application relates.*
- (2) *Without limiting the grounds on which the agency or Minister may refuse to amend the information, the agency or Minister may refuse to amend the information because—*
 - (a) *the agency or Minister is not satisfied—*
 - (i) *the information is inaccurate, incomplete, out-of-date or misleading; or*

- (ii) *the information sought to be amended is information relating to the personal affairs of the applicant or relating to the personal affairs of a deceased person; or*
- (iii) *if the information sought to be amended is information relating to the personal affairs of a deceased person, that the applicant is a person entitled to apply for amendment under section 53(2)(b); or*

(b) *the information is not recorded in a functional record.*

(3) *In this section—*

functional record, of an agency or Minister, means a record available for use in the day to day or ordinary performance of the agency's or Minister's functions.

12. Section 55 of the FOI Act allows an amendment to be made by one of two methods:

55 Amendment of information by alteration or notation

If an agency or Minister to whom an application is made under section 53 decides to amend the information to which the application relates, the agency or Minister may make the amendment by—

(a) *altering the information; or*

(b) *adding an appropriate notation to the information.*

Application of section 53 and 54E of the FOI Act

13. In this matter the applicant contends that the relevant information in the Complaint Summary and the Letter is inaccurate, incomplete and/or misleading, whereas WorkCover contends that most of the information is not.

14. Relevant for present purposes the combined effect of sections 53 and 54E is that an agency need not amend a document under the FOI Act unless it is satisfied that:

- a) the person seeking the amendment has previously had access to the document from the agency;
- b) the information which the applicant seeks to amend is information which relates to the applicant's personal affairs; and
- c) the information which the applicant seeks to amend is inaccurate, incomplete, out-of-date or misleading.

15. The applicant obtained access to the documents through previous freedom of information (FOI) applications made to WorkCover and requirement a) above is therefore clearly satisfied. I have set out below my consideration of requirements b) and c).

Information relates to personal affairs

16. The information the applicant has requested to be amended relates to a WorkCover claim made by the applicant. In *Stewart and Department of Transport* (1993) 1 QAR 227 (*Stewart*), the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' (and relevant variations) as it appears in the FOI

Act (see pages 256-267, paragraphs 79-114, of *Stewart*). In particular, the Information Commissioner said that information concerns the ‘personal affairs of a person’ if it concerns the private aspects of a person’s life and that, while there may be a substantial grey area within the ambit of the phrase ‘personal affairs’, that phrase has a well accepted core meaning which includes:

- family and marital relationships
- health or ill health
- relationships and emotional ties with other people
- domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual’s personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

17. Although a WorkCover claim relates to some extent to the claimant’s employment affairs, I consider that it primarily concerns the health or ill health of the claimant and as such falls into one of the well accepted areas of what constitutes personal affairs, as detailed above. I therefore find that requirement b) set out at paragraph 14 above is satisfied.
18. As for requirement c), I have considered below whether the relevant information is inaccurate or misleading as claimed.

The Complaint Summary

19. The applicant sought amendments to Statement One and Statement Two of the Complaint Summary as detailed in paragraph 3 above.

Statement One

20. The applicant had complained to WorkCover that the factual investigator had a conflict of interest, and Statement One is part of a ‘dot point’ paragraph that appears to outline the information WorkCover took into account when investigating that complaint. The entire paragraph reads (Statement One in bold):

‘GHR offered statements from A, B and C. LTR put forward five potential witnesses. Of these five witnesses, three provided statements that did not support LTR’s claims. One declined to provide a statement and one could not be located as he was no longer in the employ of GHR.’

21. In determining whether Statement One is inaccurate, incomplete, out-of-date or misleading I have considered each sentence individually, as set out below, as well as the paragraph as a whole. In addition, I also consider it appropriate to take into account the apparent function of the Complaint Summary in which Statement One appears—it is a record of the factors which WorkCover took into account in addressing the applicant’s complaint about how his claim was handled.
22. In my view a plain reading of the above paragraph from the Complaint Summary leads the reader to the conclusion that the individuals the applicant submitted would support him (ie his witnesses) provided information that did not support his claims. Information contained in documents that have been provided to this office indicates that this interpretation is not correct. As I will explain below, the applicant submitted a list of seven ‘involved persons’ and stated that three would be supportive of his statement.

The three the applicant said would be supportive of his claims declined to provide statements to WorkCover.

23. The first sentence of Statement One, '*LTR put forward five potential witnesses.*' is incorrect and misleading. The applicant provided this office with a copy of his statement dated 23 September 2002 taken by Maria O'Dea, psychologist. An extract of page 12 of this statement is outlined below:

MO'D: What witnesses do you have to support your statement?

DC: OK. There is a list of witnesses (refers to document).

...

MO'D: (Referring to the document titled 'Details of Involved Persons') These are the details of the involved persons, but which of these would be supportive of your statement?

Off tape LTR named D, E and F..

The document referred to in the above extract, 'Details of Involved Persons', was a list of seven names and had been supplied by the applicant. No further evidence has been submitted to this office (other than the letter discussed below) to suggest that a further list of five 'witnesses' (or a list of five 'involved persons') was ever provided by the applicant. In addition, when the applicant referred to the list of seven people in the extract above, the psychologist clarified that these seven people are 'involved persons' and he was again asked to nominate his witnesses. This is a clear indication that the list of involved persons was not perceived as being a list of the applicant's witnesses, and that the **applicant's** witnesses were those he believed would support his claims. As such it is important to distinguish between these two separate classes of people: 'involved persons' and 'witnesses'.

24. To accurately reflect that the applicant submitted a list of involved persons and then nominated his witnesses from that list, the first sentence of Statement One should be amended to read:

LTR submitted a list of seven 'involved persons'. Of these seven involved persons LTR stated that three would have been supportive of his claim.

25. The second sentence of Statement One, '*Of these five witnesses three provided statements that did not support LTR's claim.*' is inaccurate and misleading given the applicant never put forward five witnesses. Furthermore, information contained in an extract of the Confidential Report (prepared by the factual investigator dated 21 November 2002) and in WorkCover's file notes of the applicant's claim (both provided to this office by WorkCover) indicates that statements were provided by three of the seven involved persons. Those documents also indicate that all three of the applicant's nominated witnesses refused to provide a written statement and the additional involved person could not be traced.
26. The third sentence of Statement One, '*One declined to provide a statement and one could not be located, as he was no longer in the employ of GHR.*' is inaccurate and misleading. As indicated in paragraph 25 above, three of the seven involved persons declined to provide a statement. It is also relevant that it was the three involved persons the applicant had submitted as witnesses that would support his claims who did not provide statements.

27. To ensure that all relevant information is included in Statement One—ie. that it is accurate and not misleading—the second and third sentences should be amended to read:

The three witnesses that LTR said would be supportive of his claim declined to provide written statements. Of the additional four involved persons, three provided written statements that did not support his claim and one could not be traced as he was no longer in the employ of GHR.

28. WorkCover has indicated in its submissions of 16 February 2007 that it does not object to the amendments set out at paragraphs 24 and 27 above.

29. In addition to the matter addressed above, the applicant has submitted that Statement One should also be amended to record that the applicant's former employer (GHR) insisted that its representative take the statements from its employees, and that the factual investigator did not take the witness statements, contrary to published WorkCover Guidelines and procedural fairness.

30. The applicant relied on information contained in WorkCover fact sheets and a WorkCover file note dated 23 October 2002. The file note reads as follows:

Rtn ph call from BRN today 2:15pm – Adv that employer is organising statement from their workers through their HR Manager who is also a solicitor. – BRN is still trying to track down two of the W's nominated witnesses to get statements...

31. WorkCover's 'Witness fact sheet' (approved 08/07/05) contained the following information:

A WorkCover officer or trained independent interviewer will interview you and get your statement.

...

If your employer or the injured worker asks to have a representative at the interview, you should contact us immediately. We can then explain the process to the other parties. It is not appropriate for them to nominate someone to be present at the interview.

32. In a telephone conversation with staff of this office on 9 January 2007, Ms Pyburne of WorkCover advised that the information contained in WorkCover fact sheets were guidelines that did not have to be strictly followed. She stated that it was not uncommon for statements to be provided through an employer, and this was often at the request of the witness. Ms Pyburne referred to the *Workers Compensation and Rehabilitation Act 2003* (Qld) and advised that WorkCover did not have power to compel a person to provide a statement or direct the manner in which it could be provided; further, employee witnesses were at times intimidated by the investigation process and felt more comfortable having someone help them through it. WorkCover were unable to provide information about whether statements were ultimately provided through GHR's Human Resources Manager or not; and if they were, whether this was done at the employer's insistence.

33. Statement One does not say whether GHR insisted that its representative take the statements, nor does it say whether the factual investigator took the statements. I am of the view however that the absence of this information does not render Statement One inaccurate or misleading.

34. In coming to this view I have taken into account the apparent function of the Complaint Summary (in which Statement One appears)—it is a record of the factors which WorkCover took into account in addressing the applicant's complaints concerning the

way in which his claim was being processed. It would be inappropriate for me to find that Statement One should be re-drafted to include additional information that WorkCover apparently did not take into account. Furthermore, I am unable, on the information that is before me, to verify the truth of the information which the applicant seeks to have added to Statement One. In other words, I am unable to verify who ultimately took the statements, and if they were taken by the employer's representative, whether this was done at GHR's insistence.

35. I note the applicant's submissions, dated 19 March 2007, in which he contends that the manner in which the statements were taken should have been addressed by the investigation, and subsequent Complaint Summary, as this was one of the main issues of his complaint. The applicant has also suggested that WorkCover should now verify how the statements were provided as part of this external review. In my view the amendment provisions of the FOI Act do not provide an appropriate means of re-opening the investigation into the applicant's complaints regarding the handling of his WorkCover claim. It appears that the circumstances in which the statements were provided was not addressed by the investigation and as such, it would not be appropriate for me to include this information as part of the amendment.
36. Turning now to what form the amendment should take, I note that section 55 of the FOI Act provided that an amendment may be made by altering the information or adding a notation.
37. Statement One of the Complaint Summary appears to be an historical account of the factors WorkCover considered when investigating the applicant's complaint and reaching its findings. To delete Statement One and replace it with an amended version would produce a Complaint Summary that does not portray an accurate account of how the applicant's complaint was dealt with. In order to preserve the integrity of the Complaint Summary I consider it appropriate that the amendment to Statement One should be in the form of a notation rather than an alteration.

Statement Two

38. Statement Two from the Complaint Summary is as follows:

WorkCover has spent a considerable amount of time investigating LTR's complaint regarding the investigation of his claim.

The applicant has requested that a notation be inserted stating that:

Even though a considerable amount of time was spent investigating the complaint, it was not carried out in a competent manner, resulting in a complaint summary that was inaccurate, misleading and detrimental to the claimant.

39. By letter dated 7 December 2006 I conveyed to the applicant my preliminary view that Statement Two should not be amended as suggested as it is not inaccurate, incomplete, out-of-date or misleading.
40. In the applicant's response to my preliminary view, dated 21 December 2006, he provided further submissions as to why Statement Two warranted a notation. In addition, the applicant conceded that if Statement One was amended in the form he had suggested, a notation to Statement Two would not be necessary. As detailed above, I have not accepted the applicant's proposed amendment to Statement One and therefore presume that the applicant still contends that the above notation should be added to the Complaint Summary with respect to Statement Two.

41. As part of his submissions dated 19 March 2007, the applicant appeared to argue that the fact that the investigation failed to ascertain how witness statements were provided indicated that the investigation was inadequate, and on that basis, Statement Two needed to be amended.
42. I have considered the applicant's submissions and have not been persuaded to change my preliminary view. Statement Two does not provide comment on whether or not the investigation was carried out in a competent manner and the applicant has not provided sufficient evidence to establish that WorkCover did not invest 'a significant amount of time' investigating the complaint, irrespective of how that time was utilised. I consider that Statement Two records the opinion of a particular staff member at WorkCover as to the relative period of time spent investigating the applicant's complaint. In the matter of *Crewsdon v Central Sydney AHS* [2002] NSWCA 345, the New South Wales Court of Appeal found that an application for amendment of official records was 'not a vehicle for the determination of disputed questions of expert or other opinion when the recorded opinion was actually held and accurately entered in the official records.' (at paragraph 35). I consider Part 4 of the FOI Act is concerned with the accuracy of official records and operates in a similar fashion and therefore the amendment of an opinion would not be appropriate in these circumstances.
43. I find that the notation sought by the applicant should not be added to the Complaint Summary.

The Letter

44. The applicant has submitted that a list of five people under the heading '*Witnesses nominated by the Worker*' contained in the Letter is inaccurate and misleading, and has requested that a notation be added to the Letter stating that the list is incorrect as he only nominated three witnesses. In support of his submissions the applicant referred to page 12 of his statement of 23 September 2002 taken by Maria O'Dea as extracted in paragraph 23 above.
45. In my letter to the applicant of 7 December 2006, I expressed the preliminary view that the following notation should be added to the Letter:

Document amended under section 55(b) of the Freedom of Information Act 1992 (Qld) in response to a request contained in an FOI amendment application dated 27 February 2006 made by LTR.

The list of 'Witnesses nominated by the Worker' is inaccurate and/or misleading because LTR nominated only D, E and F as witnesses that would be supportive of his statement.

By letter dated 21 December 2006 the applicant accepted my preliminary view with respect to the Letter.

46. The proposed amendment to the Letter was discussed with WorkCover at a meeting on 16 January 2007, and during a telephone conversation on 5 February 2007, between Ms Pyburne from WorkCover and staff of this office. WorkCover strongly objected to the amendment on the basis that the document was not inaccurate or misleading. It was argued that the Letter did not need to specify whether the witnesses nominated by the applicant were supportive of his claim or not, and that each of the five persons listed in the Letter as '*Witnesses nominated by the Worker*' was a witness that the applicant had nominated by way of the list of seven involved persons referred to at paragraph 23 above. Ms Pyburne did accept that by taking this view, the Letter was still

technically incomplete as the list of the applicant's nominated witnesses should have included all seven involved persons.

47. WorkCover provided written submissions with respect to the proposed amendment to the Letter by facsimile dated 16 February 2007. These submissions outlined the general procedure that is followed with respect to the type of WorkCover claim made by the applicant. WorkCover said that the worker initially attends an interview with a psychologist, one of the reasons being to 'assist the injured worker to structure their complaint and to name those persons who should be questioned about the circumstances leading up to the injury.' WorkCover's submissions continued:

Whilst an injured worker may assume that some of their persons named will support his version of events, this is not always the case. On some occasions a person may give a version of an event from a different perspective than that of the injured worker. On other occasions a person may refuse to give a statement at all, as happened in LTR's case.

In WorkCover's view to define witnesses as supportive or otherwise of an injured worker's position suggest that the process of determining a claim is adversarial when it is not. It is merely part of the total evidence-gathering exercise which also includes obtaining medical evidence.

48. Regardless of what WorkCover's usual processes may be, the Letter clearly identifies two individuals as 'Employer nominated witnesses' and five individuals as 'Witnesses nominated by the Worker'. The structure of the Letter does suggest that the witnesses nominated by the employer and worker respectively, are those witnesses which each party is contending would support their case. If this was not the intention of the Letter there would seem to be little purpose in separating the witnesses into two distinct lists.
49. More importantly however, there is no information before me to suggest that the applicant ever provided WorkCover with a list of five witnesses. As outlined in paragraph 23 above, the applicant did provide a list of seven 'involved persons', however during the applicant's interview with the psychologist, the psychologist has drawn a clear distinction between 'involved persons' and 'witnesses'. Based on this clarification the applicant nominated only three witnesses.
50. Accordingly, I have decided that the information contained in the Letter is inaccurate and misleading and should be amended in the manner expressed in paragraph 45 above.

Decision

51. In respect of the application to amend the Complaint Summary, I partially set aside WorkCover's deemed decision not to amend and decide that the following notation should be added to the Complaint Summary:

Document amended under section 55(b) of the Freedom of Information Act 1992 (Qld) in response to a request contained in an FOI amendment application dated 27 February 2006 made by LTR.

The following statement is inaccurate and misleading:

'LTR put forward five potential witnesses, Of these five witnesses, three provided statements that did not support LTR's claims. One declined to provide a statement and one could not be located as he was no longer in the employ of GHR.'

The statement should more accurately read:

'LTR submitted a list of seven 'involved persons'. Of these seven involved persons LTR stated that three would have been supportive of his claim. The three witnesses that LTR said would be supportive of his claim declined to provide written statements. Of the additional four involved persons, three provided written statements that did not support his claim and one could not be traced as he was no longer in the employ of GHR.'

52. In respect of the application to amend the Letter, I set aside WorkCover's deemed decision not to amend and decide that the following notation should be added to the Letter:

Document amended under section 55(b) of the Freedom of Information Act 1992 (Qld) in response to a request contained in an FOI amendment application dated 27 February 2006 made by LTR.

The list of 'Witnesses nominated by the Worker' is inaccurate and misleading because LTR nominated only D, E and F as witnesses that would be supportive of his statement.

53. WorkCover is to provide the applicant with a copy of the amended documents within 35 days of the date of this decision.
54. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

M. Gittins
Assistant Commissioner

Date: 28 March 2007