

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 126 of 1995
(Decision No. 95031)

Participants:

JAMES MICHAEL O'DWYER
Applicant

- and -

THE WORKERS' COMPENSATION BOARD OF QUEENSLAND
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - report comprising information on annual totals of claims and premiums recorded for the respondent's workers' compensation insurance business, listed by occupation code - whether disclosure of the report could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the respondent - whether disclosure of the report would, on balance, be in the public interest - application of s.45(1)(c) of the *Freedom of Information Act 1992 Qld* - whether disclosure of the report would disclose the purpose or results or research - application of s.45(3) of the *Freedom of Information Act 1992 Qld* - words and phrases: "research".

Freedom of Information Act 1992 Qld s.5(1)(a), s.21, s.45(1)(c), s.45(3), s.45(3)(a),
s.45(3)(b), s.81

Workers' Compensation Act 1990 Qld

Workers' Compensation Regulation 1992 Qld

Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491

DECISION

I set aside that part of the decision under review (being the internal review decision made on behalf of the respondent by Mr B T Johnson, on 26 May 1995) which relates to the Report more fully described in paragraph 6 of my accompanying reasons for decision. In substitution for it, I decide that the applicant has, in accordance with s.21 of the *Freedom of Information Act 1992* Qld, a right to be given access to the Report, the respondent having failed to satisfy me that any matter contained in the Report is exempt matter under the *Freedom of Information Act 1992* Qld.

Date of Decision: 18 December 1995

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INFORMATION COMMISSIONER

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THE WORKERS' COMPENSATION BOARD OF QUEENSLAND
Respondent

REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access to information recording details of past performance in certain aspects of the business operations of the respondent. The applicant is the principal of a firm named Workers Compensation Consultancy Services (WCCS). The matter remaining in issue consists of computer records of information on certain aspects of the respondent's operations, listed by occupation code and year, and includes a number of calculations based on those records. The respondent has refused to give access to the records on the basis that they are exempt matter under s.45(1)(c) and s.45(3) of the *Freedom of Information Act 1992* Qld (the FOI Act).
2. By letter dated 2 March 1995, Mr O'Dwyer made an application to the Workers' Compensation Board of Queensland (the Board), for access to "*the Policy Statistics Premium Rating Report W S 26*". The initial decision of the Board was made by Mr P Mullins, who, in a letter dated 5 May 1995, denied access to all documents on the basis that they were exempt under s.45(1)(c) and s.45(3) of the FOI Act.
3. On 16 May 1995, Mr O'Dwyer made application for internal review of Mr Mullins' decision. The internal review was conducted on behalf of the Board by Mr B T Johnson, who, on 26 May 1995, affirmed Mr Mullins' decision and reasons for decision, without expanding on them. By letter dated 13 July 1995, Mr O'Dwyer applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Johnson's decision.

The external review process

4. I wrote to the Board on 27 July 1995, forwarding a copy of Mr O'Dwyer's application for external review, and requesting that the Board produce for my inspection copies of the documents to which Mr O'Dwyer had been refused access. The Board provided me with extracts from two computer-generated spreadsheet formats, rather than complete printouts of both spreadsheet formats, which apparently extend over thousands of pages. I have made my decision on the basis that the extracts provided are representative of the information held by the Board in the two spreadsheet formats..
5. One spreadsheet format gives insurance policy details relating to individual policies held with

the Board by employers. This document sets out information about particular policies which are identified by policy number. Although no policy holders are named, it may be possible to identify individual policy holders if access could be obtained to their policy numbers by some other means. The applicant has informed me that he does not seek access to this document, which is therefore no longer in issue in this review.

6. The other spreadsheet format was described by the Board as a "summary document", but I will refer to it in these reasons for decision as "the Report". It consists of information grouped according to occupation code and year, with a number of simple calculations derived from that information. The Report does not identify individual employers or employees but rather gives totals for particular categories of employment which are identified by occupation codes (those occupation codes are listed in the schedule to the *Workers' Compensation Regulation 1992 Qld*). In relation to each occupation code there are listed 17 columns of information, each recording information for the period prior to 1989 and then for the individual years 1989/90, 90/91, 91/92, 92/93 and 93/94. The information contained in the Report for each time period can be grouped into 5 categories:
- total numbers of policies, employees and claims made
 - total dollar amounts of wages paid, premiums paid and claims made
 - the premium rate that was actually charged
 - estimated amount of claims outstanding and claims plus estimate amounts
 - simple calculations based on the raw data included in the Report
7. After initial consultations with the applicant and the Board, I conveyed to the Board, by letter dated 1 September 1995, my preliminary view that the Report did not contain matter which is exempt under s.45(1)(c) or s.45(3) of the FOI Act, as claimed in the decision under review. I invited the Board, if it did not accept my preliminary view, to provide further submissions and evidence in support of its contention that the Report is exempt under the FOI Act. The Board responded, by letter dated 20 October 1995, stating that it had no further submissions to put forward in respect of claiming exemption for the Report.

Contentions of the participants

8. In his decision dated 5 May 1995, Mr Mullins of the Board stated:

The report contains data produced from the Board's research into trends in the growth of injuries in employment categories as well as details of wages, premiums and current claims costs, estimates of incurred claims costs and projected premium rates. A policy holder (or their representative) or an insurance company could calculate a projected premium rate using this data and make representations to the Government before it has had the opportunity to consider the matter of future movements in premium rates. As you are aware, adjustments to premium rates require amendment to the Workers' Compensation Regulation and are therefore decisions made by the Governor in Council.

Any representations made on the basis of the data or projections contained in this report would not be well founded as the data is incomplete without actuarial input. In fact the formula contained in the report is not used by the Board's actuaries to assess the real costs of incurred claims.

Release of this report into the public domain would adversely affect the Board's operations in that it would draw criticism from policy holders on the basis of a

formula which is not used to calculate premium rates. Dealing with the consequences of the release of such misleading information would divert substantial resources of the Board away from its core business.

Whilst the Board, through the provisions of the Workers' Compensation Act, currently has a monopoly on workers' compensation insurance in Queensland, there is potential for competition, given the recommendations of the Industry Commission report on workers' compensation throughout Australia and the recommendations of the Hilmer report. It is quite possible that the Board may be competing with Comcare, or perhaps private insurers, in the foreseeable future. Release of this commercially sensitive information would give a distinct advantage to potential competitors who, if they are private insurance companies, would be under no obligation whatever to disclose information of this kind in respect of their own operations. This, of course, would place the Board at a serious commercial disadvantage.

I consider that the release of this report would cause serious disruption to the workers' compensation scheme in Queensland which would not be in the public interest and would not assist the Board in its charter to provide an efficient and effective workers' compensation scheme.

9. In his application for external review, Mr O'Dwyer made the following submissions:

WCCS provides a service to Employers, Injured Workers and interested Stakeholders in their dealings with the [Board]. Mostly our representations occur when there exists conflict between the parties.

...

REQUIRED INFORMATION

The information required was the Board's Premium Rating Report WS 26. This report is an annual by-product produced at the end of the financial year along with other statistical reports. It sets out the years results cumulatively over 5 years. The details include wages, claims, numbers of policies, number of employees, premium rates both current and projected, estimates of outstanding claims and estimates plus premiums.

*This report details the actual results of the Board's underwriting results for the year. **It is not a document that is used in determining premium rates. The Actuaries use quite a separate report generated specifically to recommend premium rates.***

Since the report contains factual information there should be open access to it. The Board has a monopoly on Workers' Compensation insurance in Queensland therefore the Board should be anxious to properly inform the public at large of annual results.

BENEFIT OF KNOWLEDGE

Employers are now more sophisticated in their approach to Accident Prevention and Workers' Compensation. They have their own records of the premiums they pay and the claims amounts that are paid.

One major tool in managing performance is comparison with others in like industries. This is so with all statistics. Our client employer cannot understand why their premium rate is so high when their accident prevention strategies and claims management policies are so effective. Their rehabilitation strategies are excellent and the Board does not in any significant way assist with rehabilitation in their case. Overall the employer has in the last 10 years drastically improved performance to the benefit of the Board.

If the information in the report was made available the employer would be able to better manage their total portfolio.

PROVISIONS OF FOI ACT

The Board's citing of the provisions relied upon to deny access falls short of the complete provisions of the cited sections. For example section 45(2) negates the exemption in this very case. How the Board expects to rely upon section 45(3) for exemption is beyond us. This deals with research and has nothing to do with the matter under request. The report has been in existence for over 15 years and is virtually unchanged in its format.

We consider the Board has not been specific. And it has not been so because it really has no valid reason for exemption.

CONTENT OF WS 26

Every insurance establishment has to create premium ratings. It is common public knowledge that the rating formula includes information about claims paid, claims incurred and administration costs and in the case of private enterprise a profit component. In private enterprise real competition has a big bearing on competitive premium rates. The Board is a monopoly and it should be anxious to disclose its results.

OBJECTS OF THE ACT - W/COMP

These include - (d) to encourage safety within industry and (e) to protect the interests of employers etc and (f) to provide for the efficient and economical administration of the system etc.

Employers are targeted for the requirement of safe systems of work and claims management. The Board insists that rehabilitation is an employer's responsibility and expects total employer cooperation in all aspects of the administration of the Act.

OBJECTS OF THE ACT - FOI

The Board has totally ignored these in their responses. Further they seem to ignore the reasons for the enactment of this Act.

The Workers' Compensation Fund is a fund of the Trust and Special Funds. The Treasury is the custodian of the Fund.

Reasons for the enactment include enhancing Government accountability and

keeping the community informed.

*Safeguards included are exemptions for prejudicial effects on essential public interests. **The provision of the information sought will not prejudice essential public interests.** We feel the Board has taken a narrow self-interest stance in not meeting the objects of the FOI Act.*

INTENTIONS OF USAGE

The information is sought to provide those interested employers who make enquiries with actual details arising out of the collective results of employers policies.

This will allow employers to measure their individual performance against collective results. This performance measurement will assist in the improvement of individual performances.

Application of s.45(1)(c)

10. Section 45(1)(c) of the FOI Act provides:

45.(1) Matter is exempt matter if -

...

(c) its disclosure -

(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and

(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;

unless its disclosure would, on balance, be in the public interest.

11. I analysed the requirements of s.45(1)(c) of the FOI Act in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.516-523; paragraphs 66-88. In this case, the Board has the onus (see s.81 of the FOI Act) of establishing the following three requirements:

- disclosure of the matter in issue would disclose information concerning the business, commercial or financial affairs of the Board
- disclosure could reasonably be expected to have an adverse effect on those affairs
- disclosure would not, on balance, be in the public interest.

12. With regard to the first requirement, I find that disclosure of the Report would disclose information concerning the business, commercial or financial affairs of the Board.

13. With regard to the second requirement, I note that the expected adverse effect must be one to the business, commercial or financial affairs of the Board which the information in issue concerns (see paragraph 80 of *Re Cannon*). The correct approach to the application of the phrase "could reasonably be expected to" is explained in *Re Cannon* at p.515; paragraphs 62-63. Those words call for the decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.
14. Mr Mullins' initial decision of 5 May 1995 identified three expected adverse effects:
- a concern that a policy holder who obtained access to the information might make premature representations to the government about adjustments to the rate of premiums, making inappropriate use of the information
 - a concern that release of the information into the public domain would subject the Board to criticism and that the Board would have to divert substantial resources in order to answer this criticism
 - a concern that there is a possibility that the Board may at some stage in the future become part of a competitive market and that release of the information would benefit potential competitors.
15. In relation to the first claimed adverse effect, I consider that the fact that employers might make representations to the government about the level of premiums should not be regarded as an adverse effect on the Board's business, commercial or financial affairs. The business of the Board is to implement the statutory scheme for workers' compensation set out in the *Workers' Compensation Act 1990* Qld. Selection of premium rates is a matter for the government, acting no doubt on its assessment of advice received from the Board, and any representations received or sought from interested persons or organisations. If, as Mr Mullins' decision suggests, representations made on the basis of data or projections contained in the Report would not be well-founded, then it should be a simple matter for the Board to advise the government of this fact. It appears, from Mr O'Dwyer's submission set out at paragraph 9 above, that people well-versed in the industry are well aware of the limitations of the information contained in the Report for the purpose of recommending or determining premium rates.
16. As to the second claimed adverse effect, it is my view that subjecting the Board's operations to better informed public comment cannot be regarded as an adverse effect on the Board's operations. The Board is a public body and, as such, it is necessary that it should be responsive to public comment. It must expend resources that are necessary to be accountable to the public. I am not satisfied that disclosure of the Report could reasonably be expected to have the result that the Board would need to divert substantial resources to answer public criticism.
17. As to the third claimed adverse effect, I accept that if the Board were in competition with other organisations and it could be shown that release of the Report would advantage its competitors and disadvantage the Board, that an adverse effect could be established. However, the possibility that the Board may at some time in the future conduct its business in a competitive market is, in my view, too remote and speculative to satisfy the test for

exemption under s.45(1)(c). Any such change would doubtless involve considerable restructuring and it is equally possible, in the event that the market for workers' compensation insurance in Queensland were to be opened to general competition, that the Board could be dissolved or that the government could decide that historical information of the type contained in the Report should be provided to all newcomers to the market, in order to create a 'level playing field'. Such possibilities are, however, mere conjecture at this time, and I do not consider that this claimed adverse effect is reasonably based.

18. I therefore find that the requirement for exemption imposed by s.45(1)(c)(ii) of the FOI Act has not been established, as I am not satisfied that disclosure of the Report could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the Board which the information in the Report concerns.
19. Even if such an expectation had been established, I consider that there are significant public interest factors weighing in favour of disclosure of the Report. A major factor is that of enhancing the accountability of a government agency which is subject to the FOI Act (*cf.* s.5(1)(a) of the FOI Act). The Board has been established by the government and granted a monopoly in the field of workers' compensation insurance in Queensland. All employers who must insure with the Board, and all of their employees, have an obvious interest in the Board's performance of its functions; moreover, workers' compensation premiums represent an overhead cost to business that is inevitably reflected in the prices charged to consumers for most goods and services provided in Queensland. There is significant public interest in the people of Queensland being able to have access to documents which provide an account of the Board's performance of its functions. In my view, the Report is apt to convey meaningful information on the Board's performance in respect of its core functions, over recent years, in relation to each occupational category. The public interest in members of the community having access to information of the kind recorded in the Report is, in my view, considerable. Allied to the public interest in ensuring the accountability of government agencies is the public interest in informed community participation in government decision-making. Information (of the kind in issue) on the Board's past performance would, for instance, be of value in informing public debate concerning the future direction of arrangements for the provision of workers' compensation insurance in this State. I would therefore find that, even if the requirement of s.45(1)(c)(ii) were established, the disclosure of the Report would, on balance, be in the public interest.
20. I find that the Report is not exempt matter under s.45(1)(c) of the FOI Act.

Application of s.45(3)

21. Section 45(3) of the FOI Act provides:

45. ...

(3) Matter is exempt matter if -

- (a) *it would disclose the purpose or results of research (including research that is yet to be started or finished); and*
- (b) *its disclosure could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out.*

22. The requirements of paragraphs (a) and (b) of s.45(3) are cumulative. For the same reasons as those given above, I am not satisfied that disclosure of the Report could reasonably be expected to have an adverse effect on the Board, in terms of s.45(3)(b), and I find that the Report is not exempt matter under s.45(3) of the FOI Act.
23. I also consider that the contents of the Report cannot properly be characterised as the "results of research", within the terms of s.45(3)(a). Section 45(3) was added to the *Freedom of Information Bill* only in the Committee stage of debate on the Bill in the Legislative Assembly. There is nothing in the Parliamentary debates or legislative history of the provision which assists in its interpretation. I must therefore interpret it according to the ordinary meaning of the words which is appropriate to the context in which they appear. There are many dictionary definitions of the term "research". I will confine myself to reproducing two which I consider most closely reflect the meaning of the word "research" which is appropriate in the context of s.45(3) of the FOI Act. The New Shorter Oxford Dictionary defines research as "*a search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or by a course of scientific enquiry*". The Macquarie Dictionary defines it as "*diligent and systematic enquiry or investigation into a subject in order to discover facts or principles*". In my view, the Report is essentially a record of the business operations and performance of the Board over a number of years. In that sense, it is more akin to the business records or accounts of an organisation than to the results of a research project undertaken to discover facts or principles. I do not consider that s.45(3) was intended to extend to the business accounts, or commonly kept business records, of an organisation. I do not consider that the creation of the fifth category of information referred to in paragraph 6 above, from the information recorded in the first four categories of information, could be regarded as "research" for the purposes of s.45(3).

Conclusion

24. I therefore set aside that part of the decision under review which relates to the Report described in paragraph 6 above, and in substitution for it, I find that the Report is not exempt matter under the FOI Act. Hence, the applicant has a right to be given access to the Report under the FOI Act, subject to the payment of any relevant charges.

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 F N ALBIETZ
INFORMATION COMMISSIONER