

Cashel and WorkCover Queensland

(S 167/00, 13 September 2000, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. By letter dated 18 May 2000, the applicant (Mr Philip Cashel) sought access from WorkCover Queensland (WCQ), under the FOI Act, to the following documents:
 - *letters and reasons for the rejection of my claim as sent to my employer and doctors*
 - *plus a copy of the formal tests that were done on me on 13/1/00.*

The tests referred to are the psychological tests conducted by the independent psychologist to whom the applicant was referred by WCQ.

4. The applicant was provided with some documents, but sought an internal review on 5 July 2000, describing further documents which he believed ought to be held by WCQ. In her internal review decision made on behalf of WCQ, Ms Lynch informed the applicant that WCQ did not hold copies of the remaining documents the applicant sought. By letter dated 14 July 2000, the applicant applied for external review of that decision.

External review process

5. A member of my staff convened a conference at my office, attended by the applicant and a representative of WCQ. During the course of that conference, the applicant accepted that certain documents had never been held by WCQ, and those documents are no longer in issue in this review. WCQ also agreed to attempt to obtain from other sources copies of some documents which it had not kept (see discussion below at paragraph 11). One of those documents is no longer in issue.
6. By letter dated 11 August 2000, I informed the applicant of my preliminary views with respect to the issues in dispute. I received a response dated 20 August 2000. The applicant is clearly dissatisfied with both the outcome and the handling of his application to WCQ for compensation, arising from an injury he claims was work-related. I understand that he is presently having that decision reviewed. Unfortunately, the matters raised by him in his letter dated 20 August 2000 are directed to the merits of that process and decision, and are of limited relevance to this application under the FOI Act.

Documents sought by the applicant

7. The applicant contends that WCQ should give him access to:
 - (a) a copy of a letter sent by WCQ to the applicant's doctor, dated 11 February 2000; and

- (b) the tests conducted by the psychologist on the applicant, as part of his assessment for the purposes of preparing a report to WCQ.
8. As I indicated in *Re Smith and Administrative Services Department* (1993) 1 QAR 22 (pp.27-42, paragraphs 12-61) and in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (pp.499-500, paragraphs 14-15), I have jurisdiction to conduct an external review where an applicant who applies to an agency for access to documents complains that the searches and inquiries undertaken by the agency to locate requested documents have been inadequate.
9. I explained the principles applicable to 'sufficiency of search' cases in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464, where I indicated (at paragraph 19) that there are two questions which I must answer:
- (a) *whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);*
- and if so*
- (b) *whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

Letter dated 11 February 2000

10. This was a *proforma* letter sent by WCQ to the applicant's doctor, informing him that the claim had been rejected. WCQ informs me that it was generated from its Ipswich office by a computer program. Similar letters were automatically sent to the applicant and his employer on the same date. I am further informed by WCQ that it was not the practice of the Ipswich office at that time to retain hard copies of computer generated *proforma* letters.
11. It is not necessary for me to make any determination as to whether or not this practice represented good record-keeping practice, or was in accord with WCQ's record-keeping procedures. WCQ provided the applicant with a computer reprint of the original document, but the applicant did not find this satisfactory. I note that WCQ also attempted to obtain a copy of this letter from the doctor to add to its file, but the doctor had not kept the original. WCQ did obtain a copy of the letter sent to the applicant's employer, and the applicant has been provided with a copy.
12. I am satisfied that there are no reasonable grounds to believe that a copy of the letter to the applicant's doctor continues to exist.

Test documents held by the psychologist

13. I am informed (and I accept) that the test documents are held by the psychologist who administered them. The psychologist is not an employee of WorkCover. The psychologist is an independent practitioner who was engaged to provide a professional service on a fee-for-service basis.
14. Section 7 of the FOI Act relevantly provides:

In this Act—

...

"document of an agency" or "document of the agency" means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes—

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity.

The test imposed by the definition of "document of an agency" is comprised in the words "in the possession or under the control of an agency". A document not in the physical possession of an agency will nevertheless be a "document of the agency" for the purposes of the FOI Act, if it is under the control of the agency (or under the control of an officer of the agency in the officer's official capacity). I discussed this issue at length in my decisions in *Re Holt and Education Queensland* (1998) 4 QAR 310, and *Re Price and Nominal Defendant* (1999) 5 QAR 80 (see, particularly, paragraph 18, and paragraphs 22-27, 46-48 and 53-57 of *Re Price*). I referred the applicant to these authorities in my letter dated 11 August 2000.

15. Included in the concept of documents which are "under the control" of an agency, are documents to which the agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. The words "under the control" convey the concept of a present legal entitlement to control the use or physical possession of a document, as exists in the case of documents held on behalf of a principal by the principal's agent, or documents held by a bailee on behalf of the owner of the documents.
16. I consider that, for a document to be one which is "under the control" of an agency (or one in respect of which an agency is "entitled to access"), the agency must have a present legal entitlement to take physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations *under the FOI Act in respect of the document*).
17. WCQ does not employ psychologists to undertake assessments of applicants for workers compensation. Rather, it makes use of individuals chosen from panels of independent professionals to whom it refers applicants for workers compensation. These include psychologists, psychiatrists and other specialists. The nature of the relationship between WCQ and these independent professionals is significant in determining whether or not WCQ has a legal entitlement to take physical possession of records, notes and tests used by the independent professionals in undertaking professional assessments for the purpose of preparing a report for WCQ. The nature of the relationship is a contractual one, by which WCQ pays for a professional assessment, with expert opinion set out in a final report. The independence of the expert means that the resources used by him or her in forming an expert opinion (in this instance they would include the tests administered by the psychologist) remain their own property. They are akin to the documents described by MacKinnon CJ in *Leicestershire County Council v Michael Faraday & Partners Ltd* (1941) 2 KB 205 at pp.215-216 (when speaking of the working notes of professional valuers):

"documents which [the agent] has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on

behalf of his principal, and therefore, they cannot be said to be property of the principal."

WCQ only has a legal entitlement to possession of the final report prepared by the expert.

18. I therefore find that the tests sought by the applicant, which remain in the possession of the psychologist, are not "documents of the agency", as that term is defined in s.7 of the FOI Act, and are not subject to the application of the FOI Act.

DECISION

19. I find that:
 - (a) the tests in the possession of the psychologist are not "documents of the agency" (i.e., of WCQ) for the purposes of the FOI Act; and
 - (b) there are no reasonable grounds for believing that any documents responsive to the terms of the applicant's relevant FOI access application are in the possession or under the control of WCQ, apart from those previously identified and dealt with by WCQ under the FOI Act.
20. I therefore affirm the decision of Ms A Lynch made on behalf of WCQ and dated 12 July 2000, in so far as it relates to the issues remaining in dispute in this external review.