



## Decision and Reasons for Decision

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**Application Number:** 210653

**Applicant:** BOJ

**Respondent:** WorkCover Queensland

**Decision Date:** 16 September 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 54E of the *Freedom of Information Act 1992* (Qld) – amendment of WorkCover Queensland file – whether information is inaccurate, incomplete, out-of-date or misleading – whether documents should be added to the file.**

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## REASONS FOR DECISION

### Summary

1. I vary the decision under review and find that:
  - the applicant's WorkCover Queensland (**WorkCover**) file is not inaccurate, incomplete, out-of-date or misleading for the purpose of section 54E of the FOI Act;
  - no further amendments should be made to the applicant's WorkCover file.

### Background

2. By letter dated 21 April 2008, the applicant sought access to her WorkCover file and noted that a number of documents may have been lost or destroyed (**FOI Application**).<sup>1</sup>
3. By letter dated 24 June 2008, WorkCover decided to release the documents in full by making the documents available for the applicant to inspect (**Original Decision**).
4. By application dated 25 September 2008, the applicant sought internal review of the Original Decision and noted that there were a number of documents missing from the file (**Internal Review Application**).
5. By letter dated 3 October 2008, WorkCover affirmed the Original Decision (**Internal Review Decision**).
6. By email dated 27 October 2008, the applicant applied to this Office for an external review of the Internal Review Decision (**External Review Application**).

### Decision under review

7. The decision under review is the Internal Review Decision.

### Steps taken in the external review process

8. By facsimile dated 31 October 2008, WorkCover provided this Office with a copy of the Internal Review Decision.
9. By letter dated 5 November 2008, this Office informed WorkCover Queensland that the External Review Application had been accepted.
10. In a telephone conversation on 17 November 2008, a member of this Office spoke with the applicant in relation to her FOI Application.
11. In November 2008, the applicant provided submissions to this Office by email correspondence.
12. By letter dated 21 November 2008, this Office:

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<sup>1</sup> I note that the FOI Application does not contain the particulars required by section 54(d) and (e) of the *Freedom of Information Act 1992* (Qld). Although I do not consider this adversely affects the external review, I will rely on the applicant's FOI Application, Internal Review Application and External Review Application for the required details for the purpose of the review.

- asked the applicant to provide a schedule of contemporaneous documents held in her personal records which she considered should be included in the WorkCover file, together with copies of the documents by 5 December 2008.
  - confirmed that the Office did not have jurisdiction to review the record keeping and management practices of government agencies.
13. During the period November 2008 to January 2009 the applicant provided further submissions, information and supporting documents by email correspondence.
14. By email dated 29 January 2009, I asked the applicant to provide any final material that she considered should be added to the WorkCover file by no later than 11 February 2009.
15. During the period February to March 2009, the applicant continued to provide further submissions, information and supporting documents by email correspondence.
16. On 2 February 2009, a staff member of this Office spoke with a representative of WorkCover to discuss the inclusion of documents on the applicant's WorkCover file.
17. By letter dated 18 February 2009, I:
- provided a disc to WorkCover containing copies of the documents provided to this Office by the applicant for inclusion on her file; and
  - asked WorkCover to consider which documents it was prepared to add to its file for the purpose of informal resolution.
18. On 23 February 2009, a member of staff from the Office spoke with a representative of WorkCover to clarify an issue in my letter dated 18 February 2009.
19. By facsimile dated 3 March 2009, WorkCover advised that it was:
- prepared to add 27 documents to the applicant's WorkCover file
  - not prepared to add the remaining documents as they were either duplicates, documents already held on the file or documents that are not relevant to the WorkCover file.
20. In April and July 2009, the applicant provided information by email correspondence.
21. By letter dated 8 July 2009, I wrote to the applicant to confirm that I was in the process of drafting a preliminary view letter with respect to the documents in issue and the relevant matters in the review.
22. On 22 July 2009, a member of staff from the Office confirmed with WorkCover that a copy of its letter dated 3 March 2009 could be provided to the applicant.
23. By letter dated 22 July 2009 (**preliminary view letter**), I advised the applicant of my preliminary view that:
- apart from the documents that are duplicates or copies of documents already held by WorkCover, there is no evidence before me to suggest that the remaining documents which WorkCover declined to add to its file (the matter in issue):
    - were generated or received by WorkCover and should be on the applicant's WorkCover file

- were once included on the WorkCover file but are no longer part of the record
    - are required to be placed on the file to make the file 'complete'
  - accordingly, the information contained on the WorkCover file is not inaccurate, incomplete, out-of-date or misleading and it is not necessary to add the matter in issue to the WorkCover file.
24. By email dated 24 July 2009, I provided a copy of the preliminary view letter to WorkCover for their information.
25. On 4 August 2009, a staff member of this Office was advised by Australia Post that delivery of the preliminary view letter had been unsuccessful and it remained at the Maroochydore post office for collection.
26. By email dated 5 August 2009 to the applicant, I:
- attached a copy of the preliminary view letter, WorkCover letter dated 3 March 2009 and a copy of those documents WorkCover was prepared to add to its file
  - asked the applicant to provide a new address to which notices may be sent
  - asked the applicant to confirm that the preliminary view letter had been collected from the post office.
27. By email dated 6 August 2009, the applicant provided a new mailing address.
28. By further email dated 6 August 2009, the applicant enquired about the content of the WorkCover letter dated 3 March 2009.
29. By emails dated 6 and 16 August 2009, the applicant made submissions in response to the preliminary view letter.
30. By letter dated 2 September 2009, I:
- sent the applicant a copy of the original preliminary view letter and attachments, copies of which had been returned to this Office after they remained uncollected at the Maroochydore Post Office
  - gave the applicant a further opportunity to make additional submissions in response to the preliminary view letter.
31. In making my decision in this matter, I have taken the following into consideration:
- the Internal Review Application and External Review Application
  - the Original Decision and Internal Review Decision
  - file notes of telephone conversations between staff members of this Office and the applicant
  - file notes of telephone conversations between staff members of this Office and WorkCover
  - written correspondence (including attached documents) and submissions provided to this Office by the applicant throughout the course of the review
  - written correspondence provided to this Office by WorkCover throughout the course of the review
  - relevant sections of the FOI Act

- previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions as identified in this decision.

### **Issue in this review**

32. The applicant:

- submits that a number of documents are missing from her WorkCover file;
- has provided copies of documents to this Office which she says should be included in her WorkCover file.<sup>2</sup>

33. WorkCover has agreed to add 27 of these documents to the applicant's file.<sup>3</sup> Accordingly, these documents do not form part of the matter in issue in this review.

34. In respect of the remaining documents, WorkCover submits that it is not prepared to add these to the applicant's file as these documents are either duplicates, documents already held on the file, or documents that are not relevant to the WorkCover file.

35. In this review, the issue to be determined is:

- whether the applicant's WorkCover file is inaccurate, incomplete, out-of-date or misleading; and
- should be amended.

### **Findings**

#### ***Burden of proof***

36. In her correspondence to this Office the applicant has indicated that deficient record keeping practices and management processes and procedures have resulted, among other things, in a large number of documents missing from her file.

37. The Information Commissioner has previously found that during an external review, an applicant is burdened with a practical and evidentiary onus to provide evidence to support their entitlement to relief under Part 4 of the FOI Act.<sup>4</sup> This means that the applicant must provide evidence to support her belief that the WorkCover file is incomplete.

38. The role of this Office in the current review is therefore limited to determining whether the applicant's WorkCover file should be amended in accordance with the provisions of Part 4 of the FOI Act.

39. Accordingly, this Office does not have jurisdiction to:

- conduct a review of the record keeping and management practices, current or historic, of government agencies;
- comment or otherwise deal with issues of WorkCover's workplace practice and management in handling the applicant's claim.

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<sup>2</sup> I have numbered these documents 1-96 (there are also a number of attachments to these documents which I have numbered alphabetically).

<sup>3</sup> These are documents 1(a), 2(a), 20 (page 19), 31, 34(a), 35, 37, 43, 45, 51, 57(a), 58(a), 72(a), 74(a), 74(b), 74(c), 78(a), 80(a), 80(c), 80(e), 80(f), 80(g), 80(h), 80(i), 84(a), 93(a), 95(c).

<sup>4</sup> *Doelle and Legal Aid Office (Queensland)* (1993) 1 QAR 207 at paragraph 18.

### **Sections 53 and 54E of the FOI Act**

40. Part 4 of the FOI Act provides for the amendment of information held by government departments and agencies. Section 53(1) of 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.*

41. Section 54E of the FOI Act gives an agency discretion to amend information and sets out a non-exhaustive list of the grounds under which the agency may refuse to amend relevant information, including that:

#### **54E Discretion to amend information**

...

(2) ...

(a) *the agency or Minister is not satisfied –*

(i) *the information is inaccurate, incomplete, out-of-date or misleading ...*

42. Section 54E of the FOI Act provides that an agency may refuse to amend information if it is not 'satisfied' that the information is inaccurate, incomplete, out of date or misleading.
43. Section 55 of the FOI Act allows an amendment to be made by one of two methods, that is, by:
- a) altering the information; or
  - b) adding an appropriate notation to the information.

### **Application of sections 53 and 54E of the FOI Act**

44. The effect of sections 53 and 54E<sup>5</sup> is that for WorkCover to be required to amend the applicant's file, the following elements must be satisfied:
- a) the applicant has previously obtained access to her file from WorkCover;
  - b) the information which the applicant seeks to amend is information which relates to her personal affairs;
  - c) the information which the applicant seeks to amend is inaccurate, incomplete, out of-date or misleading.

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<sup>5</sup> as explained in *Dimitrijevic and Education Queensland* (Unreported, Queensland Information Commissioner, 31 May 2000).

### Entitlement to apply to amend the information

45. On the basis of information available to me in this review, I am satisfied that the first two of the above three elements of section 53 of the FOI Act have been met because the:

- applicant has previously accessed her WorkCover file;
- applicant's file contains information relating to her personal affairs.<sup>6</sup>

46. As to whether the third element has been met, I have considered below whether the WorkCover file is incomplete as claimed by the applicant.

### Is the information the applicant seeks to amend inaccurate, incomplete, out-of-date or misleading?

47. The terms 'inaccurate, incomplete, out-of-date or misleading' are not defined in the FOI Act and are accordingly to be understood in terms of their usual or ordinary meaning.

48. In *Re Buhagiar and Victoria Police*,<sup>7</sup> Jones J endorsed the approach taken in *G v Health Commission of Victoria*, where Rendit J indicated that the purpose of the amendment provisions concern:

*... ensuring that personal information concerning an applicant and read by third persons, does not unfairly harm the applicant or misrepresent personal facts about the applicant. It is concerned that the third persons reading the personal information do not get the wrong impression ...*

49. It is noted that the following criteria may 'usefully be borne in mind ... when considering whether the discretion should be exercised ...':<sup>8</sup>

- (a) *the character of the record, in particular whether it purports to be an objective recording of purely factual material or whether it merely purports to be the record of an opinion/report of one person;*
- (b) *whether the record serves a continuing purpose;*
- (c) *whether retention of the record in unamended form may serve a historic purpose;*
- (d) *whether the record is dated;*
- (e) *whether amendment is being sought as a de facto means of reviewing another administrative decision;*
- (f) *the extent to which access to the record is restricted;*
- (g) *whether creation of the record or any of its contents was induced by malice.*
- (h) *whether the record is part of a group of records and, if so, whether the other records modify the impact of the record in dispute.*

<sup>6</sup> See paragraphs 16-17 of *LTR and WorkCover Queensland* (Unreported, Queensland Information Commissioner, 28 March 2007) where the former Information Commissioner found in a similar case that '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 accepted areas of what constitutes personal affairs.'

<sup>7</sup> (1989) 2 VAR 530; in respect of similar amendment provisions under Victorian FOI legislation.

<sup>8</sup> *Cox and Department of Defence (Cox)* (1990) 20 ALD 499 at page 502.

50. I also note that it is not the purpose of amendment provisions such as those contained in Part 4 of the FOI Act to:

- re-write history<sup>9</sup>, as this destroys the integrity of the record-keeping process;
- determine disputed questions of opinion (including expert opinion), when that opinion was actually held and accurately entered in the official record;<sup>10</sup>
- re-write a document in words other than the author's;<sup>11</sup>
- review the merits or validity of official action;<sup>12</sup>
- correct any perceived deficiencies in the work undertaken by agencies or re-investigating matters.<sup>13</sup>

### ***Applicant's submissions***

51. In response to the preliminary view letter, the applicant submits that:

*To add to my previous concerns in relation to the Workcover letter [dated 3 March 2009] and your decision.*

*On page three it states that documents to a number of Government offices and my union will not be accepted and that only direct contact will be accepted but the Premier of Queensland is a direct Government source of contact when the staff of Workcover do not respond to the content of correspondence which is why the office of the Premier was contacted about Workcover. Workcover staff not only refused to reply to written correspondence but also blocked email ability at one point and staff were always unavailable to talk to me. If I am not allowed access through the Workcover office I am allowed to progress through the Government channels which this correspondence relates to. For this reason it is what my only ability to direct Workcover contact was a lot of the time. The Premiers office and other offices did reply where Workcover did not ...*

*They are relevant to the facts. There would be no contact to these offices if Workcover had followed their due process and procedures for injured workers in my instance as well. They did not.*

*I have a Q Comp video that was only provided to me in 2008 that shows the process and procedure made available to other injured workers. I was not provided with the equal opportunity of this process and procedure. My union were directly involved with Workcover from 1997 and were and are a source of contact as well so this also needs to be included. My union support and state their involvement on my behalf ...*

*This letter also denotes that they have no control over the content within a doctor report yet they read the reports and decide for themselves a medical decision. On this basis I believe that they do have control over what is wrote in the report as they would be required by Government Act to act immediately upon reading anything of a discriminative content. Their own doctor whose report was used to wrongly cease my claim writes that I refuse to turn my neck. This is an obvious discrimination to Government official administration staff who are allowed to read a doctor report in an insurance capacity. No*

<sup>9</sup> *DenHollander and Department of Defence* [2002] AATA 866 at paragraph 96.

<sup>10</sup> *Crewdson v Central Sydney AHS* [2002] NSWCA 345 at paragraph 34.

<sup>11</sup> *Re Traynor and Melbourne & Metropolitan Board of Works* (1987) 2 VAR 186, 190. In this decision of the Administrative Appeals Tribunal (Vic), Member Galvin considered the requirements of section 39 of the *Freedom of Information Act 1982* (Cth), which at that time was substantially similar to section 53 of the FOI Act.

<sup>12</sup> *Crewdson v Central Sydney Area Health Service* [2002] NSWCA 345 at paragraph 24.

<sup>13</sup> *Shaw and Medical Board of Queensland* (Unreported, Queensland Information Commissioner, 3 July 2008) at paragraph 57.



*doctor has the right or the ability to write what I think or what choice I make. I have no choice to my physical disabilities caused by the Queensland Transport accident injuries*

...

*Any email content by Cindy or other family members who had contact with my workplace and Workcover are relevant facts of the injuries and I request remain.*

...

*These emails and affidavit contain content that was reported to my workplace management staff and to the Premier, Workcover and other Government offices by my mother, sister and other family members who did not hearsay but were involved in what was taking place. Workcover staff themselves are involved in the hearsay part, not my family as my family were present during facts taking place. I request that these relevant documents stay as they support facts and are facts.*

...

### **WorkCover submissions**

52. In considering the documents the applicant seeks to add to her file, WorkCover submits that:

#### **i. Duplicate documents**

*Some of the documents are duplicated in the list of 159 documents provided [by the applicant].*

*I do not consider it is necessary to hold more than one (1) identical copy of a document on file. I do not determine there are any reasonable grounds for duplicate information.*

#### **ii. Information contained elsewhere**

*Even though they are not exact duplicates of another document, there are some documents which contain information already included in other documents provided.*

*For example, where [the applicant] sends an email to WorkCover and WorkCover then replies to [the applicant]. There are two documents relating to this exchange. One document contains only [the applicant's] original email. The other document contains WorkCover's response, which includes [the applicant's] original email.*

*In instances like the above example, I do not consider it necessary to have a copy of [the applicant's] original email, when the same email can clearly be identified within another document. I do not determine there are any reasonable grounds for duplicate information.*

#### **iii. Documents not relevant to WorkCover**

*There are a number of documents that I do not consider are relevant to WorkCover as part of [the applicant's] statutory file.*

*There are several reasons why I consider the documents are not relevant. The majority of documents, whilst they may contain information about WorkCover and how [the applicant] considers WorkCover has treated her, relate to correspondence with other departments and/or organisations in an attempt to resolve her issues.*

*I do not consider it is relevant for WorkCover to hold copies of emails and/or documents [the applicant] has sent to other organisations simply because the information contained is about WorkCover.*

*Some of the other organisations include –*

- QPSU
- Queensland Council of Unions
- Premiers Office
- Various Electorate Offices
- Various Queensland Parliamentary Offices
- Parliament of Australia
- Q-Comp
- The Prime Minister

*[The applicant] is able to make complaint to whomever she wishes. However, WorkCover will not add these complaints to her file, unless the complaint is made specifically to WorkCover. These documents have no bearing or direct relevance to [the applicant's] statutory claim and the management of her injury. WorkCover will not act on complaints made to other departments.*

*There are also a number of emails where [the applicant] is corresponding with Cindy. These emails detail what information Cindy and or other members of [the applicant's] family have or will be providing to various organisations to assist [the applicant's] case. I do not consider these relevant to WorkCover for the same reasons as outlined above.*

*Some documents relate to correspondence between [the applicant] and doctors that she had seen and/or their representatives. These correspondences relate to the inaccuracies [the applicant] believes occurred in their reports. For the same reasons above, I do not consider these to be relevant to WorkCover. WorkCover is aware of [the applicant's] views with regards to the medical reports on her file, however any action she requests directly from the doctors is not relevant to WorkCover. WorkCover does not have authority to discipline doctors or instruct them as to how to do their job.*

*Other documents relate to workplace issues between [the applicant] and her employer. These are not matters relevant to WorkCover or [the applicant's] claim and if [the applicant] has any concerns regarding these matters I would suggest she contact Industrial Relations. For example, the employer retiring [the applicant] on medical grounds as per their policies after [the applicant's] WorkCover claim was closed is not a matter for WorkCover.*

*Lastly, there is an affidavit of Ms...Peel on file. I do not consider this is relevant as the majority of the information contained in the affidavit is hearsay. Ms Peel is confirming what [the applicant] has said to her, and is not 'fact'.*

*The above reasons are not exhaustive reasons for refusing the documents. There may be other documents that do not fall into the above categories but that have been refused, as I do not see any relevance for adding them to [the applicant's] statutory claim file.*

**iv. Documents already held on or added to statutory claim file ...**

*Some of the documents provided are already part of the original statutory claim file (converted to microfiche) or have since been added to the file.*

**v. Documents already held by WorkCover**

*Some of the documents provided are already held by WorkCover.*

**Findings**

53. The type of documents/information which the applicant seeks to add to her WorkCover file can be generally categorised as follows:

- documents to and from the applicant, government agencies and elected representatives (other than WorkCover);
  - documents to and from the applicant and union/s;
  - medical reports and information already contained on the WorkCover file and additional reports and information sought to be added by the applicant;
  - documents to and from the applicant and friends/family members (including emails, statements and affidavits);
  - other miscellaneous documents.
54. I confirm that the relevant amendment provisions of the FOI Act are not intended to facilitate the re-writing of history (in an attempt to correct perceived deficiencies in the work undertaken by an agency or review the merits or validity of action taken by an agency) as this would destroy the integrity of the record-keeping process and introduce an artificial historical concept in the record. Nor are they intended to allow opinions (including medical reports) to be altered, when those opinions were actually held and accurately entered into the official record.
55. After carefully considering all of the information available to me, I am satisfied that there is no evidence before me:
- to suggest that the documents which the applicant seeks to add to the WorkCover file were generated or received by WorkCover and should be on the file
  - that the information which is the subject of this amendment request is required to be added to the WorkCover file on account of the file being inaccurate, incomplete, out-of-date or misleading.
56. Accordingly, on the information available to me, I am satisfied that the information which is the subject of this amendment request:
- is not inaccurate, incomplete, out-of-date or misleading;
  - should not be amended.

## DECISION

57. For the reasons stated above, I vary the decision under review and find that:
- the applicant's WorkCover file is not inaccurate, incomplete, out-of-date or misleading for the purpose of section 54E of the FOI Act;
  - no further amendments should be made to the applicant's WorkCover file.
58. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**Assistant Commissioner Henry**

**Date: 16 September 2009**