



# STATE OF INDIANA

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Mr. Steven M. Badger, Esq.  
12730 Meeting House Road, Suite 200  
Carmel, IN 46032

*Re: Formal Complaint 14-FC-117; Alleged Violation of the Access to Public Records Act by the Indiana Workers Compensation Board*

Dear Mr. Badger,

This advisory opinion is in response to your formal complaint alleging the Indiana Workers Compensation Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Board has responded via Deputy Attorney General Dino Pollack and Counsel for the Indiana Compensation Ratings Bureau ("ICRB"), E. Scott Treadway. Their response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 30, 2014.

## BACKGROUND

Your complaint dated May 30, 2014, alleges the Worker's Compensation Board of Indiana ("WCB") violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

By letter dated April 1, 2014 and received on April 7, 2014, you requested access to Worker's Compensation employer's Proof of Coverage ("POC") records. The Board denied your request by letter dated April 11, 2014, asserting POC records are confidential under Ind. Code § 27-7-2-40. You allege their denial is improper. The Board responded to your complaint on June 23, 2014. The Indiana Compensation Rating Bureau ("ICRB") also submitted a response June 19, 2014.

A substantial history exists between your client Risk Metrics Corporation d/b/a DataLister ("Risk Metrics") and the Board. Beginning in approximately 1998, your client has repeatedly, with varying amounts of difficulty, sought records from the Board. In 1999, Risk Metrics submitted a complaint to this Office with regard to disclosability of policy expiration dates. The Board argued expiration dates were exempt from disclosure

as trade secrets. In the Opinion of the Public Access Counselor 99-FC-10, this Office opined the policy expiration dates were not a trade secret and are, in fact, disclosable.<sup>1</sup>. Following the 1999 opinion, the Board provided Risk Metrics with POC data for a number of years.

In 2010, the Board cut-off Risk Metrics' access to POC data. Risk Metrics initiated another complaint with this Office. This Office declined to provide a ruling based on factual discrepancies. On March 28, 2012, Risk Metrics filed a lawsuit against the Board, seeking access to all compliance records. As a result of the discovery of a 1998 "Proof of Coverage Agreement" between a third party, the National Council on Compensation, Inc. ("NCCI") and the Board (demonstrating NCCI acts as an agent of the Board) parties settled the lawsuit. In essence, the Settlement Agreement dated January 16, 2013, specified the Board would provide POC data to Risk Metrics as long as there were no changes in law which would preclude the Board from disseminating POC data.

On July 1, 2013, Ind. Code § 27-7-2-40 became effective, making data collected and disseminated by the Indiana Compensation Rating Bureau confidential. The Board is now relying on this confidentiality requirement in denying POC data to Risk Metrics. The ICRB also asserts the data is protected as a trade secret.

## **DISCUSSION**

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." See Ind. Code § 5-14-3-1. The Indiana Workers Compensation Board is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Board's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

In order to ensure an employer's compliance with the requirement it carry workers compensation insurance, Ind. Code § 22-3-5-2 mandates employers periodically file proof of coverage information with the Board. Consequently, Ind. Code § 22-3-5-2.5

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<sup>1</sup> Citing *Harvest Life Insurance Company v. Getche*, 701 N.E.2d 871, 876 (1998), "where the information in question is a policyholder list of an insurance company that information, which can include names of customers, policy coverage, premium amounts, and expiration dates, is not a trade secret."

provides the Board with enforcement measures by way of civil penalties. Beginning in 1998, this data was collected by National Council on Compensation Insurance, Inc. (“NCCI”) as an agent of the Board. In their response, the Board alleges this contractual relationship no longer exists. However, neither the Board nor ICRB provide statements on how this information is now received by the Board. I have subsequently been advised the ICRB voluntarily gives the Board the information unsolicited.

Ind. Code § 27-7-2-3 created the ICRB, which, among other things, is charged with submitting advisory rates to the Indiana Department of Insurance. Ind. Code § 27-7-2-1 requires “every insurance company authorized to effect worker's compensation insurance in this state shall be a member of the worker's compensation rating bureau of Indiana.” Ind. Code § 27-7-2-40 allows the ICRB to collect data (including proof of coverage) from its members. Data gathered by ICRB from members is confidential, and “[t]he worker's compensation board shall not publish the data or distribute the data to third parties.” The ICRB and the Board state in their responses NCCI collects this data on behalf of the ICRB. As stated above, the ICRB then provides the Board with data received from NCCI.

Notwithstanding Ind. Code § 27-7-2-40, the data intended to be collected by Ind. Code § 22-3-5-2 is not inherently confidential. The release of this information by the Board in the past suggests this to be true as well. However, the Board suggests the information collected by NCCI (and ultimately ICRB) is not done at their behest. As a result, it appears employers are not providing data to the Board as required under Ind. Code § 22-3-5-2; and the WCB is not enforcing this requirement. The Board seems to casually treat the information as an unintended benefit of the ICRB voluntarily providing the data to it. According to the parties, the Board doesn't do anything with the information other than store the data.

Therefore, the Board and ICRB seem to suggest the data once released by the Board has taken on the characteristics of a confidential public record merely because it passes through ICRB. Ind. Code § 27-7-2-40 does not declare the information inherently confidential either – only when it is captured by ICRB.

It should be noted the complaint was not made against ICRB or NCCI. The complaint was against the Board as the custodian of information pursuant to an employer's statutory duty to file that information pursuant to Ind. Code § 22-3-5-2. An employer *shall* submit proof of coverage to the Board, while ICRB *may* collect it.

The ICRB has responded in an *amicus curiae* capacity of sorts, however, this controversy is not over whether the ICRB must release the records - Ind. Code § 27-7-2-40 makes it clear they shall not. The item of contention is whether the information has been scrubbed of its disclosability merely by the fact it is touched by ICRB while passing through to the Board.

This leads to a somewhat absurd result. The proof of coverage information seems to have two paths to travel to reach its destination. If the Board unilaterally collects it from

employers, then the information is undeniably disclosable. If the POC goes through NCCI and ICBR first, then it has been granted confidentiality.

This information was presumably intended by legislature to be public, as there is no provision suggesting otherwise. It was also intended to end up with the Board in order for the Board to insure compliance. ICRB is not under a statutory obligation to collect the data; Ind. Code § 27-7-2-40 is permissive. Ind. Code § 22-3-5-2, however, places an affirmative burden on employers to submit the data *to the Board*. This statute does not contemplate the involvement of ICRB. This also erodes the argument by ICRB the proof of coverage information is a trade secret. It would be readily available to industry competitors *but for* the ICRB/NCCI connection.

To route information through a channel so the access is limited does not fundamentally change the nature of that information just because of the participation of ICRB. If the information collected by NCCI stops with ICRB and never passes to the Board, it does not have to be released by ICRB. Surely ICRB collects information which is independent of the Board. The Board would not be obligated to release any records transferred by the ICRB other than those which are to be collected under the Board's authority. In practice, the Board is using ICRB and NCCI as a proxy for its collection efforts.

The General Assembly has granted the Board enforcement responsibilities based upon the collection of proof of coverage information. If this is being effectuated based upon the plain reading of Ind. Code § 22-3-5-2, then the proof of coverage information is disclosable public record.

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Indiana Workers Compensation Board is the intended repository for proof of coverage information. By denying the release of information upon request, the Board has violated the Access to Public Records Act. The Indiana Compensation Ratings Bureau has not acted contrary to the APRA.

Regards,



Luke H. Britt  
Public Access Counselor

Cc: Mr. Dino L. Pollack Esq.; Mr. E. Scott Treadway, Esq.