



Office of the Victorian
Information Commissioner

Information Access Series

Working with OVIC –

*making a fresh decision under
the FOI Act; and*

*the purpose, scope and
operation of section 39*

26 June 2019

Presentation Overview

- Reconsideration of an original decision at an agency or Minister's own initiative
- When can an agency or Minister reconsider a decision?
- Notification requirements
- What should be included in a fresh decision?
- The operation of section 39
- Correction or amendment?
- Inaccurate and would give a 'misleading impression'
- Case studies and examples

Reconsidering an original decision under the FOI Act

An agency or Minister may reconsider its original decision on an applicant's FOI request and make a fresh decision in two instances:

- (1) Referral back to an agency or Minister by the Information Commissioner (section 49L); or
- (2) On the agency's or Ministers own initiative (section 49M).

Section 49M – Reconsideration at an agency or Minister's own initiative

Spirit of section 49M/Legislative intention:

- To allow an agency or minister to remedy the first decision

When can an agency or Minister reconsider their original decision?

- Anytime during the review
- One chance only

Why reconsider the original decision?

Reasons include:

- Additional documents found;
- Change of circumstances (information is no longer sensitive, passage of time etc);
- Exemptions are no longer relevant;
- Additional exemptions to strengthen position; and
- After an invitation by OVIC to reconsider the original decision.

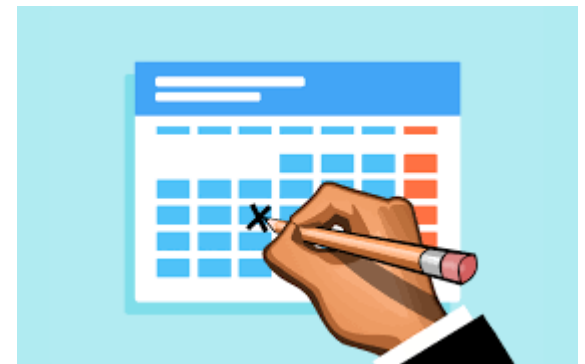


Notification requirements – Intention to make a fresh decision

- Must be in writing
- Must be sent to **both** the Applicant and the Information Commissioner

Timeframe to make a fresh decision

- Within 28 days after notification; or
- Any other agreed period.
- Extension can be sought by written agreement between the agency or Minister and the Information Commissioner (section 49M(2)).



Notification requirements – Was a fresh decision made?

- Must notify the Information Commissioner within 3 business days of the fresh decision due date whether:
 - a) a fresh decision has been made; or
 - b) a fresh decision has not been made
- No requirement to provide Information Commissioner with a copy of fresh decision at this stage.

No fresh decision made or fresh decision not made in time

- Review recommences on original decision; and
- The agency or Minister may make further submissions.

What should be included in the fresh decision?

The applicant should be informed:

- The original decision is revoked;
- About the requirement under section 49M(6);
- About the effect of section 49M(7).

Section 49M(6)

- The applicant is required to advise the Information Commissioner within 28 days of being notified of the fresh decision as to whether or not they agree with the fresh decision.

Section 49M(7)

- If the applicant fails to advise the Information Commissioner in time, the applicant is taken to agree with the fresh decision.

What happens when an applicant agrees with the fresh decision?

An applicant can agree to a fresh decision in two ways:

- (1) By notification to the Information Commissioner in time; or
- (2) By default – by failing to notify the Information Commissioner in time.

What happens next?

- The review is dismissed

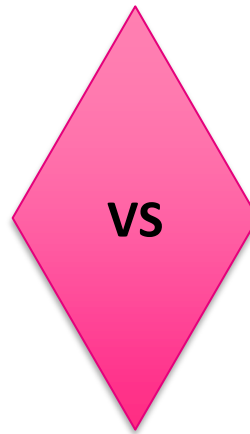
What happens when an applicant does not agree with an agency's fresh decision?

- Review will be based on the fresh decision.
- The Information Commissioner may request the following from the agency or minister:
 - A copy of the fresh decision; and
 - A copy of the documents subject to review (if necessary)
- The Information Commissioner will also invite the agency or Minister to make a submission within 14 days.
- The Information Commissioner cannot review a fresh decision if the decision is to refuse access under section 29A (documents affecting national security, defence or international relations).

Fresh decision conduct

Good fresh decision conduct:

- Made in time;
- Additional information released to the applicant;
- The applicant is informed of their rights and obligations under the FOI Act; and
- OVIC is provided with a copy of the fresh decision



In contrast:

- Additional exemptions applied; and/or
- The decision is made more complex.



Section 39

Section 39 – A person may request an amendment of record

Considerations:

- (a) Is the information personal affairs of a person?
- (b) Is the information inaccurate, incomplete, out of date; or
- (c) Does the information give a misleading impression?

What is section 39 about?

- Ensuring personal information concerning an applicant and read by third parties does not unfairly harm or misrepresent personal facts about a person
- Provides rights to an applicant to correct their own record

G v Health Commission of Victoria (unreported, Vic County Ct, Rendit J, 13 September 1984), p 10, Judge Rendit

Who can make a section 39 request?

- Any person (including a representative of a deceased person)
- Section 39 relates solely to individuals and **not corporations**

Melbourne University v Robinson [1993] 2 VR 177

Justice Eames, The Supreme Court of Victoria Court of Appeal

Section 40 – A request must:

1. made **in writing**;
2. **specify an address** to which the notice under section 43 may be sent;
3. provide the particulars of the matter by **identifying**:
 - the **specific record** held by the agency/Minister; and
 - within the record, what **specific information** is incomplete, incorrect, out of date or misleading.
4. Specify the type of **amendment to be made**.

No fee application

Amending a record under section 39

Three elements to be satisfied:

1. The document contains information relating to the **personal affairs** of the applicant;
2. The document has been **released** to the person who is the subject of the information; and
3. The information is inaccurate, incomplete, out of date, or would give a misleading impression.

Personal affairs

The AAT in *Griffiths v Victoria Police* (1987) 2 VAR 595 – took the ordinary meaning approach referring to Shorter Oxford English Dictionary definition of “personal” which is:

‘of, pertaining to, concerning or affecting the individual person or self; individual; private; one’s own’

The Tribunal’s view it is primarily “**individuality**” which creates the personal nature of personal affairs.

Personal affairs

In contrast...

Re Al-Hakim and Monash University the VCAT observed (at [15]) that it is "**perhaps open to debate**" whether the extension of the concept of "information relating to the personal affairs of any person" found in section 33(9) of the *FOI Act* is to be regarded as being applicable to the expression "information relating to the personal affairs of a person" found in section 39.

Does it include opinions?

Stephens principles:

1. the facts underlying such opinion have been thoroughly discredited or have been demonstrated to be totally inadequate;
2. the person forming such opinion was tainted by bias or ill will, incompetence or lack of balance, or necessary experience;
3. the factual substratum underlying the opinion is so trivial as to render the opinion formed dangerous to rely upon and likely to result in error;
4. the facts up on which the opinion was based were misapprehended.

Stephens v Victoria Police (1988) 2 VAR 236

What is a document released?

Re Al-Hakim and Monash University

Section 39 should not be read down that it only applies to document released through the FOI process.

An applicant may use section 39 to correct/amend a document released to them by the FOI Act **or** through some other means.

Out of date

Out of date has a meaning of further subsequent information coming into existence, which renders the earlier recorded information obsolete.

The fact that an event happened in the past does not of itself make information in respect of that event "out of date".

G v Health Commission of Victoria (unreported, Vic County Ct, Rendit J, 13 September 1984), pp 6, 9.

Inaccurate and misleading

Information will not be considered misleading, inaccurate, out of date or incomplete simply because an applicant disagrees with a determination or outcome made by an agency or other relevant authority.

The section cannot be used “as a means to achieve collateral attack upon an administrative decision.”

Smeaton v Accident Compensation Conciliation Service [2010] VCAT 1236 at [30]

Inaccurate and misleading impression

There is a difference between a misleading impression and an inaccuracy, although each will overlap the other to a large extent.

One can readily envisage circumstances where the recorded facts are inaccurate, and also give a misleading impression.

Equally, recorded facts which are accurate may yet give a misleading impression, either because of incompleteness or because the language used in recording the facts, whilst accurate, yet would convey a misleading impression.

G v Health Commission of Victoria, at page 9

For example

JF v Victoria Police [2005] VCAT 1641 – Justice Morris P held:

An extract from a database entitled “Criminal History Report” was misleading as it recorded charges that had been discharged by the Magistrates’ Court.

VCAT observed that this created the impression that such charges may have involved some element of criminality.

VCAT directed the following words be added to the entry:

“This is a record of court outcomes, including matters where a charge has been dismissed or discharged.”

Time to make a decision

Section 43 provides:

An agency or Minister shall take or reasonable steps to notify a claimant of a decision on the request **as soon as practicable**, but no later than **30 days** after the day in which the request is **received** by the agency or Minister.

How are corrections or amendments made?

Section 41

Gives the power to make an amendment, either by altering the record or by adding an appropriate notation to the record. It is the discretion of the agency as to how the record will be amended.

- Altering;
- Notations; and
- Deletions

Permission required to delete

Section 49 provides:

Where it has been acceded by an agency to amend a record, a correction or amendment it may make a notation to the original record however:

- no correction or amendment can expunge the record or destroy the original document, **unless** with the permission of the Keeper of Public records.

Review rights

Section 49A(2):

The applicant has a right to have a decision of an agency or Minister to not amend the document pursuant to section 39 reviewed by the Information Commissioner.

Section 49B

28 days after the date on which notice in writing of the decision is given to the applicant to apply for a review.

Onus of proof

- The applicant bears the onus of providing evidence to make out the prime facie case.
- However, the agency/Minister bear the 'ultimate burden' of justifying its decision not to correct or amend a record.

QXD v Monash Health (Review and Regulation)

[2018] VCAT 997 - Case study

Record held by Monash Health (the agency)	Applicant's request under section 39
Specific record	intake document contained in his medical records, held by Monash Health
Specific information	reference to 'bilateral ectopic testes' is incorrect
Amendment to be made	changed to 'retractile testes'
Third party impression as contended by the applicant)	The incorrect medical reference gives a misleading impression that the applicant was born with a birth defect.

Factual background

12 year old boy at the time of admission to Prince Henry Hospital in 1971.

Admitted for the management of short stature.

He was treated with a pituitary growth hormone for the purpose of increasing the height he would reach as an adult.

Conflicting evidence from the applicant and agency whereby he indicated that the hormone treatment led to chemical castration.

A previous investigation in 1998 regarding applicant's treatment found no record of his participation in the Australian Human Pituitary Hormone Program.

Applicant's submissions

The applicant submitted that medical files concerning him from 1972 to 2015 contain misinformation, misinterpretations and miscommunications. In his view corrections would address injustice.

He refers to eugenics, forced castration and/or sterilisation in human experimentation. In his opinion, as a 10-year-old boy when he presented to the Prince Henry Hospital Institute of Medical Research, he was unknowingly and without consent involved in male infertility experiments. [43]

His evidence and submissions also address lifelong suffering and his quest to remedy injustice.

Agency's submissions

In summary:

The evidence in this proceeding is that the condition of acquired undescended testes was not recognised at the time the relevant record was created and it was assumed that all children aged 10 with undescended testes had congenital undescended testes.

Records should not be altered following a request under s 39 of the FOI Act, on the basis that since the record was created, advances in medicine were made.

Section 39 should not be invoked as a means to substitute his opinions or the opinion of other medical practitioners for the opinions of the authors of the records in question.

Decision

Held:

the evidence **did not support** the basis for a finding that the opinions in questions are inaccurate, incomplete, out of date or would give a misleading impression.

Application of the Stephen's principles

At paragraph 55:

The applicant has not established a basis to find that:

- (a) the facts underlying the opinion have been thoroughly discredited or demonstrated to be totally inadequate;
- (b) the persons forming such opinion, the author of Intake Document and Professor Fuller in his 20 May 1998 letter, were tainted by bias or ill will, incompetence or lack of balance, or necessary experience; or
- (c) the facts upon which opinions of the day was based, were misapprehended.

Questions?

Next Seminar

