

Notice of Decision and Reasons for Decision

Applicant:	'AQ4'
Agency:	Department of Health and Human Services
Decision date:	24 October 2019
Provision considered:	Section 39
Citation:	'AQ4' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 148 (24 October 2019)

FREEDOM OF INFORMATION – request for amendment – telephone call note – misleading impression – misleading statement – information in the nature of opinion

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse to amend a document in accordance with the Applicant's request.

My decision is the same as the Agency's decision.

I have determined to refuse to grant the Applicant's request for the document to be amended by annotation under section 39, as I am not satisfied the statement recorded in the Agency's document is inaccurate, incomplete, out of date or would give a misleading impression.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
24 October 2019

Reasons for Decision

Background to review

1. On 13 June 2019, the Applicant made a request to the Agency:

... to have the document of [document number] of [date] (the **Document**) annotated as it is dishonest and misleading. The Staff member claims...

'the department is unconscionable and unjust. [The Applicant] ended the call abruptly.'

This statement is a lie and does not [match] my digital recording [thereby] I seek the document [to] be annotated with [the] statement below, ...

'the statements made on this document were not made by me [the Applicant], they were scribed by the staff member after the event. I was not given any opportunity to view any of this material nor given any opportunity to consent. Had I been given an opportunity to view this document [I] would have disputed [it] in its entirety.'

2. On 19 June 2019, the Applicant reiterated their request to the Agency, as the statement:

'the department is unconscionable and unjust. [The Applicant] ended the call abruptly.'

Did not occur.

It is completely pernicious of the staff member in question to scribe this dishonest statement without my knowledge and any future reader of this document would be misled by the dishonesty of the staff member, [named staff member].

3. By letter dated 12 July 2019, the Agency determined not to amend the Document in accordance with the Applicant's request, stating:

The Office of Housing is required to record a file note in relation to any telephone contact with departmental clients. Individual Housing Officers record file notes after a telephone call has been terminated, and as a result, file notes reflect a summarised account of the conversation that has taken place, in the opinion of that officer.

The department is not required to seek consent for recording a file note, nor review the contents of a file note of a conversation with a departmental client or any other party. File notes are intended to be internal documents and are used to catalogue contact with clients, and generally summarise the matter discussed.

...the department does not have any evidence to suggest that the record is an inaccurate account, or any rationale to support that the impact of this information would be harmful.

...any third-party reader of the file note would be aware that the file note is only a summarised account in the opinion of the officer.

In this sense, any amendment or annotation that you propose will only be used to reflect a contrary opinion as to the content of the conversation, and would not have any substantive effect on the way that the officer's account of information is interpreted, due to it clearly being an opinion of the content of the conversation.

For these reasons, I advise you of my decision to refuse to amend the record as requested by adding an annotation containing your account of the conversation in question.

4. By email dated 12 July 2019, the Applicant made an application under section 49A(2) for review by the Information Commissioner of the Agency's decision.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have read and considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision;
 - (b) the Applicant's request for review;
 - (c) the Applicant's submissions; and
 - (d) the Agency's submissions.
7. I have examined a copy of the Document subject to review.

Application of section 39

8. Section 39 provides:

39 Person may request amendment of record

Where a document containing information relating to the personal affairs of a person (including a deceased person) is released to the person who is the subject of that information (or in the case of a deceased person, that person's next-of-kin) that person shall be entitled to request the correction or amendment of any part of that information where it is inaccurate, incomplete, out of date, or where it would give a misleading impression.

9. Importantly, section 39 places onus on the applicant to establish the case for amendment. That is, an applicant must point to evidence to substantiate the claim that the statements subject to the request should be corrected or amended.
10. With respect to the way in which corrections or amendments are made, section 49 provides:

Where a request for correction or amendment under section 39 has been acceded to by an Agency, the correction or amendment may take the form of a notation of the original document but no correction or amendment shall be made which has the effect of deleting or expunging the information which has been corrected or amended or of destroying the document except with the concurrence of the Keeper of Public Records.

The information relates to the personal affairs of a person

11. The Document summarises a telephone conversation between the Applicant and an Agency officer.
12. Accordingly, I am satisfied the information sought to be amended relates to the personal affairs of the Applicant.

The information has been released to the person who is the subject of that information

13. The Document was released to the Applicant on 11 June 2019 in response to an FOI access request.

The information is inaccurate, incomplete, out of date or would give a misleading impression

14. The purpose of section 39 is to ensure personal information concerning an applicant and read by third parties does not unfairly harm or misrepresent personal facts about the applicant¹.
15. In *Setterfield v Chisolm Institute of Technology (No 2)*,² the following comments were made on the scope of section 39:

Section 39 is about words... Incorrect words either resulting from malice, false assumptions, a misunderstanding of the facts or sheer clerical bungling...

16. The applicant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression.
17. In *G v Health Commission of Victoria*,³ the following observations were made in relation to section 39:

A misleading statement or impression is one which is untrue or is likely to lead to an erroneous conclusion... Whether there would be misleading impressions is... objective. What, on the reading of the material, is fairly and reasonably open as an interpretation, not what would some person failing to apply reason or who was biased or who failed to act fairly and reasonably in interpreting the material get, as an impression.

[T]here 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, either because of incompleteness or because the language used in recording the facts, whilst accurate, yet would convey a misleading impression.

18. His Honour was of the view that where the contents of a file gives the impression that a particular act took place however, when the Applicant's explanation is read, there is a dispute created as to the correct conclusion, then the contents of the file may be held to give a misleading impression.
19. Notably, section 39 is concerned with the accuracy of official records, not with the merits or legality of the official action recorded in them⁴.
20. The Applicant, in their application for amendment, stated the statement 'the department is unconscionable and unjust' is a 'lie and did not occur'. During the course of the review, the Applicant reiterated this, stating 'I strongly object to the staff member scribing an inaccurate and misleading statement upon a public record... I do not consent'.
21. The Agency submits there is insufficient evidence that the statement the Applicant seeks to be amended is inaccurate, incomplete, out of date or would give a misleading impression.
22. The Agency further advises that it does not record audio of telephone calls made to the Office of Housing, and the Applicant has not provided their own recording of the telephone conversation.
23. The Applicant was invited to provide evidence in support of their contention that the statement is inaccurate, incomplete, out of date or would give a misleading impression under section 49H(2).
24. The Applicant provided a photograph of correspondence between Agency officers with respect to the Applicant's freedom of information request. The Applicant submits:

¹ *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at p 10.

² (1986) 1 VAR 202 at [208]-[209].

³ (unreported, Vic County Ct, Rendit J, 13 September 1984) at pp 9-11.

⁴ *Smeaton v Accident Compensation Conciliation Service* [2010] VCAT 1236.

- (a) The photograph provided clearly illustrates that the ... department intended to refuse my request for annotation prior to speaking with the [Agency officer] or gathering information pertaining to my request.
 - (b) This is outrageous and [is] clearly a breach of the [Agency] officers' legal duty.
 - (c) ... [this is] a malicious action beyond the [Agency] officers' power which the officer clearly knows would harm me.
 - (d) No reasonable person would expect an [Agency] officer to use the power allocated to them to be manipulated outside the scope of the FOI Act and to behave dishonestly by attempting to conceal the truth behind their reasoning.
25. In my view, the Applicant has not provided any evidence or information to support their view that the statement is inaccurate, incomplete, out of date or would give a misleading impression, beyond their contention that they never stated, 'the department is unconscionable and unjust', and the Agency officer 'is a liar'.
26. Accordingly, on the information before me, I am not satisfied the statement in question is inaccurate, incomplete, out of date or gives a misleading impression.

Conclusion

27. I have determined to refuse to grant the Applicant's request for the statement to be amended by way of notation under section 39, as I am not satisfied the statement recorded in the Agency's document is inaccurate, incomplete, out of date or would give a misleading impression.

Review rights

28. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁵
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
31. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
32. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁸

When this decision takes effect

33. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁵ The Applicant in section 50(3B) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).