

## Notice of Decision and Reasons for Decision

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Applicant:	'BF3'
Agency:	Victoria Police
Decision date:	10 March 2020
Provision considered:	Section 39
Citation:	'BF3' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 54 (10 March 2020)

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FREEDOM OF INFORMATION – police document – Law Enforcement Assistance Program (LEAP) report – case progress – amendment request – not incorrect or misleading

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 on the Applicant's request is the same as the Agency's decision.

I am not satisfied statements recorded in the document are inaccurate, incomplete, out of date or would give a misleading impression.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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
10 March 2020

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency to amend a document:

Please add my comments to the Incident of [date], which is on the Victorian LEAP [Law Enforcement Assistance Program] report;

[Applicant's name] (me) was in the drive way of my home, speaking with [two third parties], when two police cars spent down my drive way. Two Police grab me, hand cuffed me with my hand behind my back, one police forced my head down, the other police kned me to the left side of my head.

The two other police broke into my home (I was the only person living in the house); then I was pushed into the police van, which then proceeded to do 'Rig, Sag's' for two kil'ms up a dirt road to the [location] police Station. Two of the officers interviewed me and were told by Sgt [name] to "get their story right", the four Police were charged by my solicitor and barrister.

2. By letter dated [date], the Agency requested additional information as evidence to establish the record sought to be amended is incomplete, incorrect, out of date or misleading.
3. On [date], the Applicant provided an excerpt of the FOI Act, a copy of their amendment request and covering correspondence.
4. By letter dated [date], the Agency determined not to amend the document in accordance with the Applicant's request, stating:

As per my letter to you, it is required under section 40 of the *Freedom of Information Act 1982* (the Act) that your request:

- a. shall be in writing;
- b. shall specify an address to which a notice under section 43 may be sent to the person making the request; and
- c. shall give particulars of the matters in respect of which the claimant believes the record of information kept by the agency or Minister is incomplete, incorrect, out of date or misleading and shall specify the amendments that the claimant wishes to be made.

Your response did not satisfy section c) of the above criteria.

Accordingly, as you have not provided the information required under s. 40(c), I have determined not to amend the documents as requested.

5. By letter dated [date], the Applicant made an application under section 49A(2) for review by the Information Commissioner of the Agency's decision.
6. On [date], the Applicant provided the following documents in support of their request for amendment:
  - (a) Law Enforcement Assistance Program (**LEAP**) 'Incident report and case progress', dated [date];
  - (b) written submission, dated [date]; and
  - (c) a copy of correspondence sent by the Agency to the Applicant dated [date].

7. On [date], the Applicant consented to this Office sharing the documents provided on [date] with the Agency.
8. On [date], the Agency made a fresh decision under section 49M(1) in which it determined not to amend the LEAP record dated [date].
9. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
10. The Applicant raised concerns that the Agency's fresh decision was the same as its original decision. I accept the Agency's fresh decision is the same as the original decision in that the Applicant's request for amendment was refused. However, the grounds for the Agency's fresh decision differ from the original decision. Accordingly, I am satisfied the Agency's fresh decision is not the same as the Agency's original decision.

### **Application of section 39**

11. 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.

12. Importantly, section 39 places the onus on an applicant to establish the case for amendment. That is, an applicant must establish their claim the record subject to an amendment request should be corrected or amended.
13. 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 and has been released to the person who is the subject of that information***

14. The Applicant is seeking an amendment to the LEAP record dated [date] (the **Document**) by adding their own comments to the LEAP database.
15. I have reviewed the content of the Document. I am satisfied the Document relates to the personal affairs of the Applicant.
16. The Document was released to the Applicant in response to an earlier FOI request.

#### ***Is the information inaccurate, incomplete, out of date or would give a misleading impression?***

17. 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 applicant.<sup>1</sup>

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<sup>1</sup> *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at p10.

18. In *Setterfield v Chisolm Institute of Technology (No 2)*,<sup>2</sup> 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...

19. The Applicant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression.

20. In *G v Health Commission of Victoria*,<sup>3</sup> 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.

21. The Applicant submits the following information in the Document is incorrect and misleading:

Police attended at [address] as a result of a domestic dispute between [redacted] unlawful assault occurred when [redacted]. [Applicant] tried to prevent [redacted] from leaving. [Applicant] then committed [description of allegation].

Police arrived and intervened and [Applicant] assaulted 4 members while resisting arrest.

[Applicant] complained re treatments by police and denies allegations.

22. In support of their contention, the Applicant provided:

- (a) an alternative version of events, in which they deny the allegations; and
- (b) a copy of correspondence sent by the Agency to the Applicant dated [date].

23. The Agency states:

... I am of the view that the "comments" you have requested be added to the LEAP narrative are merely your version of events and no proof as to their veracity has been provided.

24. I consider the Agency's record to be an accurate record of its position with respect to the allegations made against the Applicant at the time the Document was created.

25. The Document amounts to one source of information in relation to the Applicant's involvement with police and the allegations made against them.

26. I consider the Applicant's position that they dispute the version of events to be sufficiently reflected in the final sentence of the Document, which states the Applicant complained about their treatment by police and denied the allegations.

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<sup>2</sup> (1986) 1 VAR 202 at [208] - [209].

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

27. On the information before me, I am not satisfied the information in the document is inaccurate, incomplete, out of date or would give a misleading impression for the purpose of section 39.

### **Conclusion**

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

### **Review rights**

29. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>4</sup>
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>6</sup>
32. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
33. 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.<sup>7</sup>

### ***When this decision takes effect***

34. 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.

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<sup>4</sup> The Applicant in section 50(1)(ea) and the Agency in section 50(3D).

<sup>5</sup> Section 52(5).

<sup>6</sup> Section 52(9).

<sup>7</sup> Sections 50(3F) and (3FA).