

## Notice of Decision and Reasons for Decision

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Applicant:	'BM6'
Agency:	Department of Health and Human Services
Decision date:	23 April 2020
Provision considered:	Section 39
Citation:	'BM6' and Department of Health and Human Services ( <i>Freedom of Information</i> ) [2020] VICmr 121 (23 April 2020)

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FREEDOM OF INFORMATION – request for amendment – in-person conversation 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 on the Applicant's request is the same as the Agency's decision.

I am not satisfied the statements recorded in the Agency's documents are inaccurate, incomplete, out of date or would give a misleading impression.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  
23 April 2020

## Reasons for Decision

### Background to review

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

...to amend a Housing integrated information Program (**HiiP**) File note recording an in-person conversation between [the Applicant] and a [specified] Officer at [location] Housing Office on [date] (the **Document**) ... as it is inaccurate and would give a misleading impression.

I would like the Document amended [by way of notation] to state that in relation to this record:

- 1) *'I never rolled my eyes and whispered [expletive].*
- 2) *The officer [named staff member] was not trying to smile and make jokes with me.*
- 3) *I did not whisper at any stage for the officer to [expletive].*
- 4) *The officer [named staff member] has deliberately exaggerated, overstated, and embellished upon this document to give a false and misleading impression'.*

2. The terms of the Applicants request are identical to a previous request made by the Applicant on [date], which was refused by the Agency on [date].
3. In this matter, the Applicant claims to have an audio recording of the conversation they had with an Agency officer and they believe supports their amendment request under section 39.
4. By letter dated [date] and [date], the Agency determined to refuse the Applicant's amendment request, stating:

... I note that your intention for this request was to provide an audio recording of the relevant conversation in order to substantiate your argument that the information reflected in the HiiP file note is inaccurate and would give a misleading impression.

As the FOI Unit has not received a copy of this audio recording – and I acknowledge that you have made several unsuccessful attempts to provide this over email – I wish to advise you that I have determined that a decision for your request can still be made even without further context.

In relation to points one and three of your amendment request, I have considered that no audio recording would be required to make an informed decision. This is because the information you wish to be amended is either non-verbal in nature, and thus would not be evident in an audio recording, or it refers to phrases you are alleged to have whispered, which may not be audible in any audio recording.

Therefore, there is no available evidence to support that the current record of the conversation is inaccurate or otherwise misleading, and any audio recording would not be able to provide such evidence.

For these reasons, I advise you of my decision to refuse to amend the record to reflect the sought annotations in points one and three of your request.

In relation to points two and four of your amendment request..., you are seeking to add an annotation to the record to effectively question the manner in which the mindset and intention of the relevant [specified] Officer has been represented in the file note. As the file note is designed to reflect client contact from the perspective of the departmental author, the observations and intentions of the author are the personal information of that individual.

In accordance with the [FOI] Act, section 39 does not permit an amendment to be sought on such information, as it is attempting to change the personal information of a person other than yourself.

Further, there is also lack of objective proof as to the intentions of the officer that would give weight to an argument that the file note contains inaccurate or misleading information.

For these reasons, I advise you that there is no scope under the [FOI] Act to consider an amendment to the record to reflect the sought annotations in points two and four of your request.

5. By email dated [date], the Applicant made an application under section 49A(2) for review by the Information Commissioner of the Agency's decision.
6. I have examined a copy of the Document.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. The Agency seeks to rely on its decision letters dated [date] and [date] and a previous submission dated [date] that it provided in relation to a previous review of an amendment request made by the Applicant.
9. I have read and considered all communications and submissions received from the parties, including:
  - (a) the Applicant's submission dated [date] and information provided with the Applicant's review application;
  - (b) the Agency's decision letters dated [date] and [date];
  - (c) the Agency's previous submission dated [date]; and
  - (d) correspondence with my office in the course of this review.

#### **Application of section 39**

10. 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.

11. Importantly, section 39 places onus on an applicant to establish the case for an amendment. That is, an applicant must point to evidence to substantiate their claim a document subject to their request should be corrected or amended.
12. 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.

#### ***Does the information relate to the personal affairs of a person?***

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

***Has the information been released to the person who is the subject of that information?***

15. The Document was released to the Applicant on [date] in response to an FOI request.

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

16. The purpose of section 39 is to ensure personal affairs information concerning an applicant in the possession of an agency and read by third parties does not unfairly harm or misrepresent personal facts about the applicant.<sup>1</sup>
17. Notably, section 39 is concerned with the accuracy of official records, not with the merits or legality of the official action recorded in them.<sup>2</sup>
18. In *Setterfield v Chisolm Institute of Technology (No 2)*,<sup>3</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. In *G v Health Commission of Victoria*,<sup>4</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.

20. The Agency primarily relies on its decision and previous submission to highlight its view there is insufficient evidence the Document is inaccurate, incomplete, out of date or would give a misleading impression. Rather, the Agency submits the Applicant has stated their view they did not make the statement attributed to them in the Document and the Agency officer 'deliberately exaggerated' and 'did not try to smile and make jokes'.
21. As stated above, the Applicant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression.
22. The Applicant was invited to provide evidence to support their view the Document is inaccurate, incomplete, out of date or would give a misleading impression.
23. As detailed above, the Applicant claims to have an audio recording of the conversation in dispute. A copy of this audio recording was not provided to the Agency or during this review. However, the

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

<sup>2</sup> *Smeaton v Accident Compensation Conciliation Service* [2010] VCAT 1236.

<sup>3</sup> (1986) 1 VAR 202 at [208]-[209].

<sup>4</sup> (unreported, Vic County Ct, Rendit J, 13 September 1984) at pp 9-11.

Applicant provided a written transcription reported of this audio recording from '[specified business]' titled, '[Agency Officer] [specified] Officer Being Aggressive' (the **Transcript**). The Applicant submits:

- (a) the Transcript provided is evidence that 'there were no whispers' and that 'the [Agency Officer] had lied and therefore sought to mislead'; and
  - (b) the Transcript supports their contention that the Document is inaccurate, incomplete, out of date and would give a misleading impression.
24. With the Applicant's consent, in the interests of trying to resolve this matter, OVIC staff provided a copy of the Transcript.
25. The Agency responded by noting the contents of the Transcript and reaffirmed its decision submitting:
- (a) The Transcript does not address or provide evidence in relation to the non-verbal elements of the contact referred to in the Document, as it cannot convey tone, demeanour or words that were whispered, mouthed or otherwise inaudible. As such, the Transcript is not a complete record and does not provide the incorrectness of the Document.
  - (b) HiiP file notes are designed to be records of communication for officers to record pertinent information about the Agency's management of housing clients and the services provided to them, for viewing by other officers in order to inform practice and future service. In this sense, HiiP file notes are not designed to be an absolute source of truth, but a subjective account of events from the perspective of the recoding officer.
26. On the information before me, I am not satisfied the Applicant has provided any evidence or information to support their view the Document is inaccurate, incomplete, out of date or would give a misleading impression.
27. While the Applicant has provided a copy of the Transcript, on its face, it does not address or provide evidence in relation to the non-verbal elements of the statements recorded in the Document, which appears to be central to the Applicant's concern.
28. Accordingly, I have determined to refuse to grant the Applicant's request for the document to be amended under section 39.

### **Conclusion**

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

### **Review rights**

31. 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.<sup>5</sup>
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>

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<sup>5</sup> The Applicant in section 50(3B) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

34. 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.
35. 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>8</sup>

***When this decision takes effect***

36. 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>7</sup> Section 52(9).

<sup>8</sup> Sections 50(3F) and (3FA).