

Notice of Decision and Reasons for Decision

Applicant:	'BL7'
Agency:	Victoria Police
Decision date:	15 April 2020
Provision considered:	Section 39
Citation:	'BL7' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 113 (15 April 2020)

FREEDOM OF INFORMATION – police document – Law Enforcement Assistance Program (LEAP) report – case progress – amendment request – information 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 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 requirements under section 39 are met, and the Applicant's request for the Document to be amended under section 39 is refused.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

15 April 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency to amend or make additions to certain documents. Following consultation with the Agency, the Applicant was asked to clarify their initial request.
2. The Applicant responded to the Agency requesting amendment to documents [through the addition of the Applicant's comments relating to particular criminal charges being added to the Applicant's record].
3. By letter dated 21 October 2019, 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of which the claimant believes the record of information kept by the agency or Minister is incomplete, incorrect, out of date or misleading and shall specify the amendments that the claimant wishes to be made.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.

4. By letter received on 28 October 2019, the Applicant made an application under section 49A(2) for review by the Information Commissioner of the Agency's decision.
5. On 19 December 2019, the Applicant provided the following documents in support of their request for amendment:
 - (a) Law Enforcement Assistance Program (LEAP) 'Master Name Involvement' and 'Charge Result List', dated [date], previously released to them under FOI;
 - (b) a copy of the Applicant's Community Corrections Order of the [named Court] of Victoria, showing the Applicant's conviction of [number] criminal charges;
 - (c) a copy of the Applicant's Result of Appeal of the [named Court] of Victoria
 - (d) a copy of the Applicant's Undertaking of Bail and Notice of Obligations of Bail issued at the [suburb] Magistrates' Court; and
 - (e) a copy of correspondence sent by an Agency officer to the Applicant dated [date].
6. On 20 January 2020, the Applicant consented to this office sharing the documents they provided on 19 December 2019 with the Agency.
7. On 20 March 2020, the Agency made a fresh decision under section 49M(1) in which it determined not to amend the LEAP record.

8. 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.
9. The Applicant raised concerns 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 its 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

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 the onus on an applicant to establish the case for amendment. That is, an applicant must establish their claim that a record subject to an amendment 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.

The information relates to the personal affairs of a person and has been released to the person who is the subject of that information

13. The Applicant seeks an amendment to the LEAP database record (the **Document**) by adding their comments to reflect that, while originally charged with [specified number of] offences, following a plea deal, they were convicted of [specified number of] charges.
14. I have reviewed the content of the Document and am satisfied it concerns the personal affairs of the Applicant.

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

15. 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 an applicant.¹
16. 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...

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

² (1986) 1 VAR 202 at [208]-[209].

17. As stated above, the applicant bears the onus of demonstrating the information in the document is inaccurate, incomplete, out of date or would give a misleading impression.
18. 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.

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

... the part of my leap [record] which has [specified number of charges] against me is in-complete./ the document that you have requested to [forward] to the Police are part of the in-complete file which the [specified number of charges] is in allegations.

20. The Agency states:

...You appear to be asking for the relevant record to be annotated or amended to reflect that you were only found guilty of [specified number of] charges. The record you seek to amend states that you were charged with [specified number of] offences. My enquiries indicate that you were charged with [specified number of] offences and as such, the record is not inaccurate, incomplete, or out of date. Neither does it give a misleading impression.

21. I consider the Agency's record to be an accurate record of the number of charges originally laid against the Applicant, while noting the Applicant pleaded guilty to and was convicted of [specified number] of the [specified number of] charges.
22. Accordingly, I am not satisfied information in the document is inaccurate, incomplete, out of date or would give a misleading impression in order to meet the requirements under section 39.

Conclusion

23. On the information before me, I am not satisfied the requirements under section 39 are met, and the Applicant's request for the Document to be amended under section 39 is refused.

Review rights

24. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for a review.⁴
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶

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

⁴ The Applicant in section 50(3B) and the Agency in section 50(3D).

⁵ Section 52(5).

27. 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.
28. 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.⁷

When this decision takes effect

29. My decision does not take effect until the relevant review period (stated above at paragraph 26) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).