

## Notice of Decision and Reasons for Decision

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Applicant:	'CG8'
Agency:	Victoria Police
Decision Date:	9 November 2020
Provision considered:	Section 39
Citation:	'CG8' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 311 (9 November 2020)

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FREEDOM OF INFORMATION – police document – traffic incident report – amendment request – incorrect information – amendment by notation

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 differs from the Agency's decision.

I am satisfied the hospital named in the Document is inaccurate and have granted the Applicant's amendment request under section 39 in relation to Proposed Amendment 3 to correct this information.

However, I am not satisfied the other information in the Document is inaccurate, incomplete, out of date or would give a misleading impression. Accordingly, the Applicant's amendment request in relation to Proposed Amendments 1, 2 and 4 are refused.

My decision in relation to each proposed amendment is set out in **Annexure 1**.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

9 November 2020

## Reasons for Decision

### Background to review

1. On [date], the Applicant, through their representative, made a request to the Agency requesting an amendment to a Traffic Incident System Report (the **Document**) relating to a motor vehicle accident.
2. The following summarises the requested amendments to the Document sought by the Applicant:

No.	Document	Page	Information in document	Why is it incorrect	What should the amendment state
1	Police report [number]	Page 1	Paragraph 4 'a [gender] approached from within 2 vehicles and walked out in front of the driver without checking for traffic and failing to use the pedestrian crossing'	This information is misleading	Correct statement should be "a [gender] pedestrian was walking on the pedestrian crossing, the driver failed to stop and hit the [gender] pedestrian who was walking on pedestrian cross"
2	Police report [number]	Page 1	Paragraph 4	This information is incomplete	[named Police Officer] in charge of this case advised that 'the driver failed to give way to [gender] pedestrian and hit [the pedestrian], driver has already been issued an infringement notice and has been prosecuted', this information didn't reflect on the report
3	Police report [number]	Page 2	Section 3 Pedestrian Statistics 'hospital name [hospital name]'	This information is incorrect	Section 3 Pedestrian Statistics 'hospital name [hospital name]'
4	Police report [number]	Page 2	Section 3 Pedestrian 'no written statement'	This information is incomplete	The [gender] pedestrian wanted to give written statement to [named Police Officer] but was told not necessary. Now [gender] pedestrian received the police report which is quite different to the fact and truth.

**(Proposed Amendments 1 – 4, respectively)**

3. By letter dated [date], the Agency determined to refuse the Applicant's amendment request, stating:

I have reviewed the information provided by you and I am of the view that the information you have provided are merely your version of events and no proof as to their veracity has been provided. This office was not provided with any proof of your request, ie medical documents etc. Therefore, you have not satisfied s39 of the Act in that you have not satisfied subsection (c). After consideration of the information provided to this office, I have determined not to amend the documents as requested.

4. By email dated [date], the Applicant made an application under section 49A(2) for review by the Information Commissioner of the Agency's decision to refuse the amendment request.
5. I have examined a copy of the Document sought to be amended.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. 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 letter dated [date]; and
  - (c) correspondence with my office in the course of this review.
8. On [date], the Agency confirmed it is willing to make Proposed Amendment 3 on the basis the Applicant subsequently provided evidence of attending the [hospital name].

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

9. 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.

10. 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.
11. 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?***

12. The Document is an official police incident report that summarises a motor vehicle accident involving the Applicant.
13. 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?***

14. The Document was released to the Applicant on [date] in response to a request made to the Agency's Accident Records Service.

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

15. 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>
16. 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>
17. 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...

18. In *G v Health Commission of Victoria*,<sup>4</sup> the following observations were also 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 Agency relies on its decision there is insufficient evidence to demonstrate the Document is inaccurate, incomplete, out of date or would give a misleading impression.
20. As stated above, the Applicant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression.
21. 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. In response, the Applicant's representative provided the Applicant's written statement which refuted the version of events recorded by the attending police officer in the Document. This presents a conflict of fact and, in the absence of any independent evidence from the Applicant, I am unable to determine which version of events is more accurate.
22. I consider the Document is an accurate record of the incident report created at the time of the motor vehicle accident. However, since the date of the review request, and following the independent evidence provided by the Applicant's representative, the Agency has confirmed it is willing to make Proposed Amendment 3, correcting the name of the hospital listed in the Document.

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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.

23. Given the name of the hospital is a statement of fact, I am satisfied this fact is inaccurate based on the Applicant's evidence and the Agency's agreement and should be amended by way of notation.

### **Conclusion**

24. I am satisfied the hospital named in the Document is inaccurate and have granted the Applicant's amendment request under section 39 in relation to Proposed Amendment 3 to correct this information.
25. However, I am not satisfied the other information in the Document is inaccurate, incomplete, out of date or would give a misleading impression. Accordingly, the Applicant's amendment request in relation to Proposed Amendments 1, 2 and 4 are refused.
26. My decision in relation to each proposed amendment is set out in **Annexure 1**.

### **Review rights**

27. 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>
28. 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>
29. 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>
30. 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.
31. 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>

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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).

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

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

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Directions in relation to amendment granted
1.	[Date]	Traffic Incident System Report [number]	4	Refused Applicant's request for amendment in full  Section 39	<p>Proposed Amendment 1 is refused.</p> <p>Proposed Amendment 2 is refused.</p> <p>Proposed Amendment 3 is granted by way of notation to the incident report.</p> <p>Proposed Amendment 4 is refused.</p>	<p>Add the following notation to the Document:</p> <p><i>Pedestrian subsequently confirmed that attendance was at [hospital name].</i></p>