

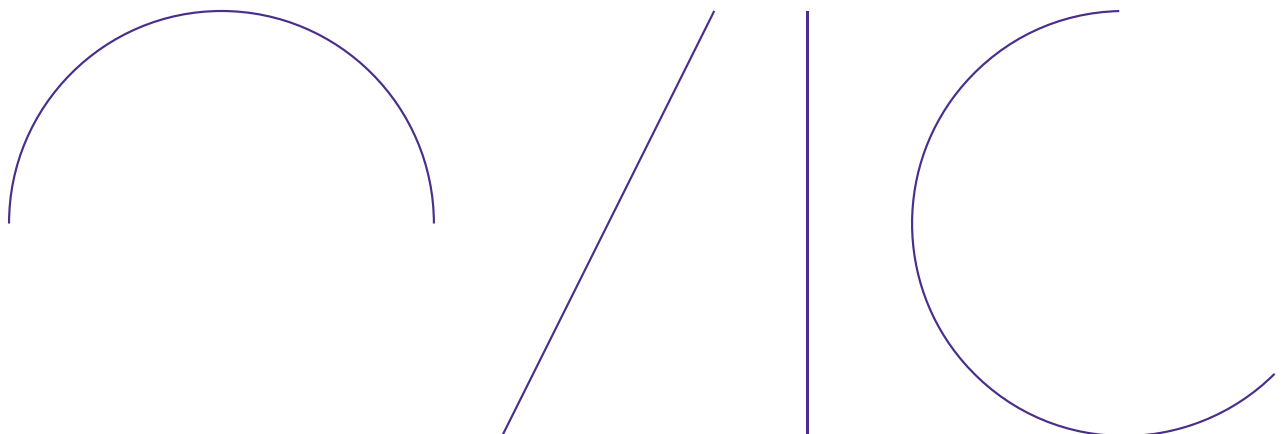


Office of the Victorian
Information Commissioner

Part V – Amendment of personal records

Freedom of Information Guidelines

FREEDOM OF INFORMATION



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All legislative references are to the *Freedom of Information Act 1982* (Vic) (**the Act**) unless otherwise stated.

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Section 39 – Person may request amendment of records

Extract of legislation

39 Person may request amendment of records

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be entitled to request the correction or amendment of any part of that information where it is inaccurate, incomplete, out of date, or where it would give a misleading impression.

Guidelines

An overview of section 39

- 1.1. Section 39 gives individuals (or their next of kin) the right to ask an agency or Minister to amend a document containing the individual's (or a deceased person's) personal information, held by the agency or Minister, where the individual believes the document contains wrong or misleading information about them.
- 1.2. An individual may request an amendment where the:
 - individual (or their next of kin) has a copy of the document they would like amended;
 - document contains information relating to the individual's personal affairs; and
 - individual (or their next of kin) believes the personal information is wrong or misleading.

For information on:

- what 'next-of-kin' means, see [section 33 – Document affecting personal privacy](#);
- how to make an amendment request, see [section 40 – Form of request](#).

- 1.3. A request under section 39 cannot be used to dispute or challenge the validity or legality of a decision. Its purpose is to ensure a document contains accurate information, and the information does not unfairly harm or misrepresent the claimant.¹
- 1.4. Further, an amendment made under section 39 generally cannot have the effect of deleting or expunging information that has been corrected or amended.² The amendment should take the form of an alteration or notation to the record.
- 1.5. Before processing a request for an amendment of records under Part V, an agency or Minister should first consider whether it is appropriate to make the amendment outside of the Act and seek the claimant's consent to do so. This is discussed further below.

Purpose of the right to request an amendment

- 1.6. Section 39 is concerned with the accuracy of words in government-held records so the information in them does not unfairly harm or misrepresent personal facts about an individual. It helps to ensure third parties reading personal information about the individual do not get the wrong impression.³
- 1.7. Conversely, the purpose of section 39 is not to:
 - provide an opportunity to 'shape or colour' information that an agency or Minister holds, according to a claimant's own preferences;⁴
 - re-write a document to substitute a claimant's own opinion for the author's opinion;⁵
 - dispute or challenge the validity or legality of a decision or official action recorded in a document.⁶

¹ Part V refers to a 'claimant' instead of an 'applicant'. However, examples in this section may refer to 'applicant' to reflect the individual's status as an applicant for review of the amendment decision.

² [Freedom of Information Act 1982 \(Vic\)](#), section 49.

³ *G v Health Commission of Victoria* (County Court, 13 September 1984) at [10].

⁴ *Re Buhagiar v Victoria Police* (1989) 2 VAR 530 at pages 531 and 532, referring to *Gesell J* in the context of the amendment provisions of the US Privacy Act in *RR v Department of the Army* 482 F Supp 770 (1980) at [773].

⁵ *Re Lee v Ministry of Education* (1989) 3 VAR 429 at page 434.

⁶ *Smeaton v Accident Compensation Conciliation Service* [2010] VCAT 1236 citing *Crewdson v Central Sydney Area Health Service* [2002] NSWCA 345.

Example

In *Setterfield v Chisholm Institute of Technology (No 2)* (1986) 1 VAR 202, the agency recorded a resolution for the applicant's dismissal in meeting minutes.

The applicant wanted to add a notation to the meeting minutes to the effect that the resolution for her dismissal was invalid because quorum for the meeting was not met and therefore the agency was not permitted to proceed with the meeting.

The application was refused on the grounds that section 39 is concerned with recalling accurately what occurred and if the resolution to dismiss the applicant was recorded accurately. The lawfulness of the resolution has nothing to do with section 39.

Making amendments outside of the Act

- 1.8. An agency or Minister should first consider whether it is appropriate to make the requested correction or amendment outside of the Act.
- 1.9. Taking a proactive approach is consistent with the object of section 39 to promote fairness to individuals by ensuring personal information contained in government documents do not unfairly harm the person to whom it relates,⁷ by providing a less formal means to correct or amend records.
- 1.10. It is also consistent with:
 - Information Privacy Principle (IPP) 3.1, which requires organisations to which the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**) applies to take reasonable steps to make sure that the personal information it collects, uses or discloses is accurate, complete and up to date; and
 - Health Privacy Principle (HPP) 3.1, which requires organisations to which the *Health Records Act 2001* (Vic) (**HR Act**) applies to take steps reasonable in the circumstances (having regard to the purpose for which the information is to be used) to make sure that the health information it collects, uses, holds, or discloses is accurate, complete, up to date, and relevant to its functions or activities.

⁷ *G v Health Commission of Victoria* (County Court, 13 September 1984) at [10].

1.11. However, an agency or Minister should consider their other obligations relating to public records and any other relevant matters when deciding whether amendment outside of the Act is appropriate. For example, an agency or Minister must still consider their retention and disposal obligations under relevant Public Record Office Victoria retention and disposal authorities.⁸

1.12. For example, an agency or Minister should consider:

- whether the information is clearly wrong or not contentious (for example, the claimant's date of birth has been recorded incorrectly in their personnel file) and could be amended outside of the Act; or
- if a notation could be included in the record to note any disputed information and why it is in dispute (for example, including a file note with the claimant's views or adding a flag to an electronic system).

1.13. Regarding notations, under [sections 46](#) and [47](#), a claimant may require an agency or Minister to add a notation with the claimant's view of the information, after the agency or Minister has refused the request and the Victorian Civil and Administrative Tribunal (**VCAT**) affirms the decision. To take a proactive, fairer, and more resource efficient approach, an agency or Minister should consider whether adding such a notation would satisfy the claimant's request in the first instance, but only where this is appropriate.

1.14. If an agency or Minister can amend a record outside of the Act, the agency or Minister should contact the claimant as soon as practicable after receiving the request and discuss what can be corrected or amended outside of the Act. The agency or Minister should get the claimant's consent before proceeding and explain that by amending the record outside of the Act, they will lose their right to review but they may make another amendment request if they wish.

When will section 39 apply?

1.15. The right to request an amendment in section 39 applies to information:

- relating to the claimant's personal affairs (or the personal affairs of a deceased person) which was released to the claimant (or in the case of a deceased person, their next-of-kin); and
- that is inaccurate, incomplete, out of date, or would give a misleading impression.

⁸ Public Record Office Victoria, Retention and Disposal Authorities (RDAs), available [here](#).

Information relating to the claimant’s personal affairs

- 1.16. To make an amendment request under section 39, the information that the claimant wishes to amend must relate to their ‘personal affairs’.
- 1.17. The term ‘personal affairs’ means information ‘of, pertaining to, concerning or affecting the individual person or self; individual; private; one’s own’.⁹ It is the ‘individuality which creates the personal nature of personal affairs’.¹⁰
- 1.18. Section 39 is generally used to correct wrong information about individuals retained by an agency or Minister for its purposes.¹¹

Examples of information relating to an individual’s personal affairs

- records of a decision which relate to the personal affairs of the individual;¹²
- medical records including hospital records, medical reports, medical opinions;¹³
- documents relating to work performance and work capacity of a person;¹⁴
- police incident report involving the individual;¹⁵
- documents summarising conversations between the individual and an agency officer;¹⁶
- LEAP database records containing criminal charges relating to the individual.¹⁷

⁹ The Administrative Appeals Tribunal in *Griffiths v Victoria Police* (1987) 2 VAR 595 took the ordinary meaning approach to interpreting ‘personal affairs’, referring to the Shorter Oxford English Dictionary definition of “personal”.

¹⁰ *Griffiths v Victoria Police* (1987) 2 VAR 595.

¹¹ *Griffiths v Victoria Police* (1987) 2 VAR 595 at [596], accepted by the Victorian Civil and Administrative Tribunal in [Smeaton v Victorian WorkCover Authority](#) [2009] VCAT 1977 at [29].

¹² [Smeaton v Victorian WorkCover Authority](#) [2009] VCAT 1977 at [30].

¹³ *Resch v Department of Veterans’ Affairs* (1986) 9 ALD 380 at [36] however in this case, the Deputy President distinguished a medical opinion from a determination duly made by an administrative authority charged with administering a scheme; [‘AQ2’ and St Vincent’s Health \(Freedom of Information\)](#) [2019] VICmr 128 (30 September 2019); [‘AG4’ and Melbourne Health \(Freedom of Information\)](#) [2019] VICmr 58 (28 June 2019).

¹⁴ *Griffiths v Victoria Police* (1987) 2 VAR 595.

¹⁵ [‘CG8’ and Victoria Police \(Freedom of Information\)](#) [2020] VICmr 311 (9 November 2020).

¹⁶ [‘BM6’ and Department of Health and Human Services \(Freedom of Information\)](#) [2020] VICmr 121 (23 April 2020); [‘AQ4’ and Department of Health and Human Services \(Freedom of Information\)](#) [2019] VICmr 148 (24 October 2019).

¹⁷ [‘BL7’ and Victoria Police \(Freedom of Information\)](#) [2020] VICmr 113 (15 April 2020).

1.19. The fact that a document may also be a record of a decision does not mean the document will not relate to the individual's personal affairs. For example, in [Smeaton v Victorian WorkCover Authority \[2009\] VCAT 1977](#), VCAT stated at [30]:

... the fact that the documents are also records of a decision, does not rob them of their other attribute of containing information related to the Smeaton's personal affairs. The fact that the documents record decisions is relevant when it comes to exercising the discretion under section 39 and the limits to the exercise of that discretion.

A document that was 'released' to the claimant

1.20. The document with the information that the claimant would like amended must have been released to the claimant. The claimant does not need to have received the document in response to an FOI request.¹⁸ Section 39 can apply where the claimant gets access to the document in other ways.

Case example

In ['BM7' and Austin Health \(Freedom of Information\) \[2020\] VICmr 122 \(23 April 2020\)](#), the Applicant received a copy of the document they wanted to amend from their general medical practitioner.

Referring to *Al-Hakim*,¹⁹ the Public Access Deputy Commissioner found section 39 can be invoked whether an applicant seeks to amend a document obtained under the Act or another way.

Information that may be amended

Inaccurate, incomplete, out of date, or where it would give a misleading impression

1.21. The Act does not define the terms 'inaccurate', 'incomplete', 'out of date', or 'where it would give a misleading impression'.²⁰ In the context of their usual or ordinary meaning, these terms can mean:

- inaccurate** – information may be inaccurate if it is factually incorrect about the claimant, such as their date of birth, residence or educational qualification;

¹⁸ *Re Al-Hakim v Monash University* (unreported, VCAT, Macnamara DP, 12 July 2002) at [26].

¹⁹ *Re Al-Hakim v Monash University* (unreported, VCAT, Macnamara DP, 12 July 2002) at [26].

²⁰ The claimant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression. For information on evidence requirements, read section 40 – Form of request for amendment of record.

- **incomplete** – information may be incomplete if it is lacking in parts, or it has missing information;
 - **out of date** – information may be out of date where new information has come into existence that has made existing information obsolete. However, it is important to note information being old, does not by itself make it out of date; or
 - **would give a misleading impression** – information that would give a misleading impression does not necessarily have to be untrue, rather it is information that is likely to cause a reader to reach an incorrect conclusion.
- 1.22. Considering whether information is misleading or would give a misleading impression is an objective assessment. An agency or Minister should consider, based on the information and evidence available, what impression is fairly and reasonably open as an interpretation. This assessment must be free from bias.²¹
- 1.23. The terms outlined above often overlap. For example, a record may contain wrong information which also gives a misleading impression. Similarly, a record may contain factually correct information, but the information may be incomplete or the language used to convey the factually correct information would convey a misleading impression.²²

Case example of ‘misleading impression’

VCAT found that an extract from a Victoria Police database with the heading ‘Criminal History Report’ which was stated to be the ‘criminal history’ for the Applicant, gave a misleading impression because the document’s heading created the impression that the discharged charges may have involved some element of criminality where it recorded charges that had been discharged by the Magistrates’ Court.

VCAT ordered that the following words be added to the entry, in a prominent location: "This is a record of court outcomes, including matters where a charge has been dismissed or discharged".²³

Case example of ‘inaccurate’ information

The Information Commissioner found that a document outlining a clinician’s observation that a deceased person had tattoos was incorrect because the facts underlying the observation had been demonstrated to be incorrect. The Claimant provided a letter from the Funeral Director/Qualified Embalmer who prepared the deceased person’s body, confirming the deceased person does not have visible tattoos.²⁴

²¹ *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at [9]-[11].

²² *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at [9]-[11].

²³ *JF v Victoria Police* [2005] VCAT 1641.

²⁴ *DY4 v Barwon Health (Freedom of Information)* [2022] VICmr (21 March 2022).

Opinions

1.24. Information that may be amended under section 39 is not limited to factual information; it can also include opinions.²⁵

1.25. Generally, information in the nature of an opinion may be amended if it falls into one of the following four categories:

- the facts underlying the opinion have been thoroughly discredited or have been demonstrated to be totally inadequate;
- the person forming the opinion was tainted by bias or ill will, incompetence or lack of balance, or necessary experience;
- the factual basis underlying the opinion is so trivial as to render the opinion formed dangerous to rely on and likely to result in error; or
- the facts upon which the opinion was based were misapprehended.²⁶

1.26. A claimant generally cannot use section 39 to substitute their own opinion or re-write a document in words other than the author's, except where the information is inaccurate, incomplete, out of date, or misleading.²⁷

Case example where an opinion was amended

In *Re Foster v Victoria Police*,²⁸ the Applicant was a serving member of the Agency. He disputed aspects of a written comment made about him by a senior Agency officer which had been entered in his record of conduct and service.

The comment related to the Applicant's work performance and noted:

- the Applicant's objectivity and professionalism in a particular investigation which raised the question of his competence as a detective and whether he should be retained in a particular unit;
- the Applicant's attitude to disciplinary action was not satisfactory;
- there was doubt as to whether the Applicant should again serve at a higher rank, and the doubt must be addressed if the Applicant applied to serve at a higher rank.

²⁵ *Re Stephens and Victoria Police* (1988) 2 VAR 236 applying *Corbett v Australian Federal Police* (1986) 5 AAR 291.

²⁶ *Re Stephens and Victoria Police* (1988) 2 VAR 236.

²⁷ *Re Traynor v Melbourne and Metropolitan Board of Works* (1987) 2 VAR 186, page 190.

²⁸ *Re Foster v Victoria Police* (1989) 3 VAR 110 (VICAAT).

The Administrative Appeals Tribunal held that the original comment should be expunged, finding that:

- The disputed comment would give a misleading impression about the extent to which the Applicant's career service to date had been satisfactory because the comment placed undue emphasis on one incident which was out of proportion to the Applicant's overall career.
- To some extent, the facts underlying the comment were demonstrated to be totally inadequate and the comment's author was tainted by unconscious bias by giving undue weight to the one particular incident.
- The record to be amended would have a direct effect on the Applicant's career in the Force for as long as he remained a member. The original comment was made by a very senior officer and to remove any possibility of injustice, the original comment was to be expunged.

Case example where a medical opinion was not amended

In *QXD v Monash Health*,²⁹ the Applicant sought to amend a hospital intake document which outlined a medical diagnosis from 1974. The Applicant disputed the diagnosis and wanted the record to reflect what he believed to be the correct one.

VCAT decided not to amend the opinions in the record, noting:

- The claimant's evidence did not form a basis for a finding that the opinions in question are inaccurate, incomplete, out of date or would give a misleading impression.
- The complex evidence did not provide a basis for preferring the claimant's evidence to contrary evidence.
- Section 39 may not be used as a vehicle to amend an earlier document where medical science has advanced, and a view expressed in the earlier document becomes inaccurate in that it is out of date.

How does section 39 work with privacy law?

1.27. The main pieces of legislation that deal with privacy in Victoria are the PDP Act and HR Act.

1.28. FOI and privacy law intersect in two main ways:

²⁹ [*QXD v Monash Health \(Review and Regulation\)* \[2018\] VCAT 997 \(29 June 2018\)](#).

- **Keeping information up to date:** the PDP Act and the HR Act generally require organisations to which the relevant law applies to take reasonable steps to make sure that the personal or health information it collects is accurate, complete, and up to date and provides the right to make a complaint to OVIC or to the Health Complaints Commissioner if the individual believes the organisation has failed to do so;³⁰ and
- **Right to request an amendment:** the FOI Act, PDP Act and HR Act each provide the right to request an amendment to certain information.³¹ However, the FOI Act is the main way to ask for an amendment to personal information held by Victorian government agencies. If the FOI Act does not apply, then depending on the kind of information involved, the PDP Act or the HR Act may apply to provide a way to correct information in a record.

See examples below for more information on when to use section 39, the PDP Act, or the HR Act.

Access and correction under the Privacy and Data Protection Act 2014 (Vic)

- 1.29. IPP 6 under the PDP Act relates to personal information.³² It outlines that if an agency holds personal information about an individual, it must give the individual access to the information on request by the individual, subject to some exceptions.
- 1.30. IPP 6, however, only applies when the FOI Act does not (for example, where the FOI Act does not apply to certain organisations).³³ The purpose of this is to preserve the established system of access under the Act, rather than introduce overlapping systems which may be confusing.
- 1.31. If the information to be amended is in a [document](#) held by a Victorian agency, or in an [official document of a Minister](#), then the FOI Act will apply.³⁴
- 1.32. However, there are some documents that cannot be accessed or amended under the Act or under IPP 6 because of section 14(3) of the PDP Act. That section states that IPP 6 does not apply to certain documents to which the Act does not grant access.

See examples below for more information.

³⁰ See IPP 3.1 under the PDP Act and HPP 3.1 under the HR Act regarding the obligation for organisations to maintain individuals' information. An individual may make a privacy complaint under section 57 of the PDP Act to [OVIC](#). An individual may make a complaint under section 45 of the HR Act to the [Health Complaints Commissioner](#).

³¹ See IPP 6 under the PDP Act for access and correction of 'personal information' and HPP 6 under the HR Act for access and correction of 'health information'.

³² [Privacy and Data Protection Act 2014](#) (Vic), section 3 (definition of 'personal information').

³³ [Privacy and Data Protection Act 2014](#) (Vic), section 14.

³⁴ [Privacy and Data Protection Act 2014](#) (Vic), section 14(1) and section 14(2).

Access and correction under the *Health Records Act 2001* (Vic)

- 1.33. HPP 6 under the HR Act relates to health information.³⁵ It outlines that if an agency holds health information about an individual, it must give the individual access to the information on request by the individual, subject to some exceptions.
- 1.34. HPP 6, however, only applies when the Act does not (for example, where the Act does not apply to certain organisations).³⁶ The purpose of this is to preserve the established system of access under the Act, rather than introduce concurrent systems which may be confusing.
- 1.35. If the information to be amended is in a [document](#) held by a Victorian agency, or in an [official document of a Minister](#), then the Act will apply.³⁷
- 1.36. However, there are some documents that cannot be accessed or amended under the Act or under HPP 6 because of section 1416(b) of the HR Act. That section states that HPP 6 does not apply to certain documents to which the Act does not grant access.

See examples below for more information.

Examples of when to use the Act, IPP 6 or HPP 6

Type of document	Section 39	IPP 6	HPP 6
A document of an agency	Yes	No	No
An official document of a Minister	Yes	No	No
Note: Documents in the possession of a Minister that do not fall within the definition of ‘official document of a Minister’ may be subject to IPP 6 if they contain personal information or HPP 6 if they contain health information.			
A document of a prescribed authority	Yes	No	No

³⁵ [Health Records Act 2001](#) (Vic), section 3 (definition of ‘health information’).

³⁶ [Health Records Act 2001](#) (Vic), section 16.

³⁷ [Health Records Act 2001](#) (Vic), section 16.

Non-judicial documents of courts or tribunals (for example, employee records) ³⁸	Yes	No	No
Judicial or quasi-judicial documents of courts or tribunals (for example, a court judgement) ³⁹	No	No	No
A document of a Parliamentary Secretary Note: Part 3 of the PDP Act and Part 2 of the HR Act apply to Parliamentary Secretaries whereas the definition of ‘ agency ’ in the FOI Act does not include a Parliamentary Secretary. ⁴⁰	No	Yes (if the document contains personal information)	Yes (if the document contains health information)
Contracted service providers (CSP)	No (but if the outsourcing agency has possession or constructive possession of the document, then it may be a document of the agency) ⁴¹	Yes (if the document contains personal information and the CSP has been contractually bound to the IPPs) ⁴²	Yes (if the document contains health information and the CSP falls under the definition of private sector organisation in the HR Act) ⁴³

³⁸ ‘Judicial functions’ are considered in section 6 and section 29B.

³⁹ ‘Judicial functions’ are considered in section 6 and section 29B.

⁴⁰ [Privacy and Data Protection Act 2014](#) (Vic), section 13(1)(b); [Health Records Act 2001](#) (Vic), section 10(1)(b); [Freedom of Information Act 1982](#) (Vic), section 5.

⁴¹ For information on what ‘possession’ or ‘constructive possession’ means, see the definition of ‘[document of an agency](#)’ in section 5(1).

⁴² [Privacy and Data Protection Act 2014](#) (Vic), section 13(1)(j).

⁴³ [Health Records Act 2001](#) (Vic), section 11.

Private sector organisation (excluding CSPs) ⁴⁴	No	No	Yes (if the document contains health information and the organisation falls under the definition of private sector organisation in the HR Act) ⁴⁵
Other bodies established or appointed for a public purpose by or under an Act, that are not covered by the Act Note: Some bodies may not fall under the definition of an agency under the Act, but still fall within the definition of organisation in the PDP Act and/or the HR Act. ⁴⁶	No	Yes (if the document contains personal information)	Yes (if the document contains health information)
Bodies excluded from the operation of the Act by section 5(3) Note: Some bodies are excluded from the definition of ‘prescribed authority’ by section 5(3). This includes ‘prescribed offices’, listed under regulation 7 of the <i>Freedom of Information Regulations 2019</i> (Vic).	No	No ⁴⁷	No ⁴⁸

⁴⁴ [Health Records Act 2001 \(Vic\)](#), section 11.

⁴⁵ [Health Records Act 2001 \(Vic\)](#), section 11.

⁴⁶ ‘Organisation’ is defined in section 3 of the PDP Act as meaning public sector organisations captured section 13 of that Act; similarly, section 3 of the HR Act defines ‘public sector organisation’ as a person or body that is referred to in Division 1 of Part 2.

⁴⁷ Section 14(3) of the PDP Act states that documents captured by section 5(3) are not covered by IPP 6.

⁴⁸ Section 16(b) of the HR Act states that documents captured by section 5(3) are not covered by HPP 6.

Documents of the Office of the Victorian Information Commissioner (OVIC) which relate to an FOI review, an FOI complaint, or an investigation.

No⁴⁹

No⁵⁰

No⁵¹

How does section 39 work with public records law?

- 1.37. Agencies and Ministers have obligations under the [Public Records Act 1973 \(Vic\)](#). This includes maintaining records for a minimum amount of time (outlined in retention and disposal authorities issued by PROV).
- 1.38. When amending a document under the FOI Act, an agency or Minister cannot delete information in a document or expunge a document without the Keeper of Public Records' authorisation.⁵² This authorisation is done on a case-by-case basis, and it is not automatic.
- 1.39. An agency or Minister may ask for the Keeper of Public Records' authorisation to delete information or expunge a document by:
- emailing agencyqueries@prov.vic.gov.au;
 - providing details of the request (including the information and/or records involved);
 - whether the agency or Minister supports the request, and if so, why;
 - the harms that the incorrect or misleading information is causing; and
 - the retention requirements for the records (including the relevant Retention & Disposal Authority and Class and minimum mandatory retention period if known).

For more information on record keeping, visit PROV's website, including:

- 'Privacy and Recordkeeping Obligations' Topic Page: <https://prov.vic.gov.au/recordkeeping-government/a-z-topics/privacy-and-recordkeeping-obligations>; and

⁴⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 6AA which outlines the Act does not apply to a document in OVIC's possession (or in the possession of a contractor, agent or other person acting for or on behalf of OVIC) to the extent that the document is the subject of or discloses information that relates to a review under Part VI, a complaint under Part VIA, or an investigation.

⁵⁰ Section 14(3) of the PDP Act states that documents captured by section 6AA are not covered by IPP 6.

⁵¹ Section 16(b) of the HR Act states that documents captured by section 6AA are not covered by HPP 6.

⁵² [Freedom of Information Act 1982 \(Vic\)](#), section 49.

- Retention and Disposal Authorities (RDAs), available here: <https://prov.vic.gov.au/recordkeeping-government/how-long-should-records-be-kept/retention-and-disposal-authorities-rdas>.

More information

Information Privacy Principles Guidelines – [IPP 6 – Access and Correction](#)

[Section 40 – Form of request for amendment of record](#)

Information for individuals: [How to make a request for an amendment](#)

Section 40 – Form of request for amendment of record

Extract of legislation

40 Form of request for amendment of record

A request under section 39—

- (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.

Guidelines

Requirements for making a valid amendment request

- 1.1. Section 40 outlines how to make a valid request to amend records under section 39.
- 1.2. Under section 40, a request for amendment must:
 - be made in writing;
 - specify an address for a notice under [section 43](#) to be sent; and
 - provide information explaining:
 - o why the claimant believes the document is incomplete, incorrect, out of date or misleading; and
 - o what amendments the claimant would like the agency or Minister to make.
- 1.3. Before accepting and processing a request for an amendment, the agency or Minister should carefully consider the terms of the request to ensure the claimant has:
 - specifically identified the information to be amended;
 - provided an explanation, or evidence, to support the amendment; and
 - specifically noted in their request the amendments to be made to the record.

1.4. There are no fees or charges associated with amendment requests made under section 39.

The onus for establishing a case for amendment is on the claimant

1.5. The onus for establishing a case for amendment is on the claimant. This means the claimant must provide evidence to demonstrate how the information is inaccurate, incomplete, out of date or would give a misleading impression.⁵³

1.6. If the request does not contain an explanation or evidence to support the amendment, the agency or Minister should ask the claimant to provide an explanation and supporting evidence. However, evidence from the claimant may not be required where other records of the agency or Minister contain sufficient evidence to support the request.

1.7. The following prompts may be helpful when requesting more information:

- Incorrect: why is the information untrue or inaccurate?
- Incomplete: what specific information is missing?
- Out of date: how have the circumstances changed since that time?
- Misleading: how would the information give a misleading impression and who would be misled and how?
- What evidence can the claimant provide which supports their amendment request? For example:
 - o a document from a third party;
 - o a written account of the claimant's version of events;
 - o a witness statement.

1.8. Depending on how many amendments the claimant is seeking, or how complex the amendment request is, it may be useful for an agency or Minister to provide a claimant with a table or similar tool to help the claimant outline what amendments they are seeking and why.

Example of a table

No.	Date of document	Document name	Page	Information	Why is it incorrect?	What should the amendment state?	Evidence to support the amendment
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⁵³ See [Roberts v Police \(Vic\) \[2004\] VCAT 1660](#) at [8]. See also [Connell v Department of Justice \[2005\] VCAT 1903](#) at [19] and [QXD v Monash Health \[2018\] VCAT 997](#) at [21].

Example	DD/MM/YYYY	Doctor's report	2	Paragraph 3 states that my address is XYZ	<input type="checkbox"/> Incorrect <input type="checkbox"/> Incomplete <input type="checkbox"/> Out of date <input type="checkbox"/> Misleading	My correct address is ABC.	Driver's licence
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Case example of evidence to support an amendment request

[DY4 v Barwon Health \(Freedom of Information\) \[2022\] VICmr 13](#)

The applicant sought to amend an observation of deceased person in a document, which stated the deceased person has tattoos. The claimant submitted the deceased person does not have tattoos.

In support of their claim, the applicant provided a letter from the Funeral Director/Qualified Embalmer who prepared the deceased person's body. The letter confirmed that the deceased person does not have visible tattoos.

Through the course of the Information Commissioner's review, the letter from the Funeral Director was placed on the deceased person's medical file.

- 1.9. Once the claimant has provided evidence to make a prima facie case that the information in the documents in question is inaccurate, incomplete, out of date or would give a misleading impression, the agency or Minister has the burden of justifying its decision.⁵⁴

More information

See the FOI Guidelines on:

- [section 39 – Person may request amendment of records;](#)
- [section 43 – Time within which agency or Minister must notify claimant.](#)

[Freedom of information amendment request form template](#)

⁵⁴ [Roberts v Police \(Vic\) \[2004\] VCAT 1660](#) at [8]; [QXD v Monash Health \[2018\] VCAT 997](#) at [22].

Section 41 – Agency or Minister may amend record

Extract of legislation

41 Agency or Minister may amend record

Where an agency to which or Minister to whom a request is made under section 39 decides to amend the record of information to which the request relates, the agency or Minister may, in its or his discretion, make the amendment either by altering the record or by adding an appropriate notation to the record.

Guidelines

How records may be amended

1.1. Forms of correction or amendment of information under Part V include:

- altering the information;⁵⁵
- adding a notation;⁵⁶

or in limited circumstances:

- deleting or expunging the information;⁵⁷ or
- destroying the document.⁵⁸

See [section 49 – How corrections or amendments are made](#) for information on deleting or expunging information or destroying a document.

1.2. Section 41 gives an agency or Minister the discretion as to how an amendment is made.

⁵⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 41.

⁵⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 41 and section 42.

⁵⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 49.

⁵⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 49.

Altering a record

- 1.3. Altering a record is one way an agency or Minister may make an amendment. An alteration may involve:
 - striking through the incorrect information;
 - inserting information next to the incorrect information;
 - using explanatory language to make it clear any change to the record was done under the Act (for example, 'amended under section 39 of the Act').
- 1.4. Altering a record helps maintain the integrity of the record by keeping the original information.
- 1.5. [Section 42](#) outlines the requirements for adding a notation on a record.

More information

See the FOI Guidelines on:

- [section 42 – Notation on record;](#)
- [section 49 – How corrections or amendments are made](#)

Section 42 – Notation on record

Extract of legislation

42 Notation on record

Where an agency or Minister amends a record by adding a notation to the record, the notation shall—

- (a) specify the respects in which the information is incomplete, incorrect, out of date or misleading; and
- (b) in a case where the information is claimed to be out of date—set out such information as is required to bring the information up to date.

Guidelines

Including a notation on a record

1.1. If an agency or Minister decides to amend a record by adding a notation to it, the agency or Minister must:

- outline how the information is incomplete, incorrect, out of date, or misleading; and
- where the information is claimed to be out of date, outline sufficient information to bring the information up to date.⁵⁹

1.2. The level of detail will depend on the type of amendment requested by the claimant. However, the notation should:

- clearly identify the information that is being amended by notation; and
- provide sufficient information to make the record complete, correct, up to date, or no longer misleading.

1.3. For example, a notation might include adding:

- a hard copy covering note to a file;
- an electronic note to a case management system;

⁵⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 42.

- a warning flag in an electronic system.

Case example

In [*Smeaton v Victorian WorkCover Authority \[2009\] VCAT 1977*](#),⁶⁰ the Victorian Civil and Administrative Tribunal (VCAT) ordered that the notations to the Applicant's decision file be made by adding a covering note to the file with reference to the VCAT proceeding and by adding a bundle of documents which shows there is disagreement about the file.

VCAT considered adding a notation in this way would not interfere with the integrity of the decision file because:

- the added documents will sit in the same file as the original documents;
- a reader will understand there is disagreement about the documents and will be able to understand both points of view.

VCAT's notation order

VCAT ordered the notations be made by:

- (a) attaching to the inside front cover of a decision file, a bundle of documents on red or pink paper with a covering note which says:

"This bundle of documents has been placed on claim file No 09 992 50790 by order of VCAT dated 24 September 2009 in proceeding No G 71/2009 brought by [the Applicants] and should be read prior to further review of this file."

The bundle of documents were:

- (i) a notice under section 39;
 - (ii) a letter from the insurer to the Applicants advising that their claim is rejected;
 - (iii) a sworn statement by a psychiatrist involved in the matter, for use in the VCAT proceedings; and
- (b) attach a letter from the insurer to the Applicants, which was annotated by the Applicants to correct what they say are inaccuracies in the letter.

⁶⁰ [*Smeaton v Victorian WorkCover Authority \[2009\] VCAT 1977*](#) at [31].

More information

See the FOI Guidelines on:

- [section 39 – Person may request amendment of record;](#)
- [section 41 – Agency or Minister may amend record.](#)

Section 43 – Time within which agency or Minister must notify claimant

Extract of legislation

43 Time within which agency or Minister must notify claimant

Where a request is made to an agency or Minister under section 39, the agency or Minister shall take all reasonable steps to enable the claimant to be notified of a decision on the request as soon as practicable but in any case not later than 30 days after the day on which the request is received by or on behalf of the agency or Minister.

Guidelines

Time within which an agency or Minister must process an amendment request

- 1.1. Under section 43, an agency or Minister must notify the claimant of a decision as soon as practicable, but no later than 30 days after receiving a valid request.

For information on how to make a valid amendment request, see [section 40 – Form of request for amendment of record](#).

- 1.2. If an agency or Minister does not provide a written decision to the claimant within the 30 days, for the purpose of applying for a review, the agency or Minister is taken to have refused to amend the record in accordance with the amendment request.⁶¹ In these circumstances, the claimant may apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the decision.⁶²

⁶¹ [Freedom of Information Act 1982 \(Vic\)](#), section 53(1).

⁶² [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(ea).

Section 44 – When section 26 to apply

Extract of legislation

44 When section 26 to apply

Section 26 applies in relation to a decision in respect of a request made under section 39.

Guidelines

Who can make a decision on an amendment request?

- 1.1. Decisions made under [section 39](#) must be made by an authorised decision maker under section 26(1).

For more information on who an authorised decision maker is, see [section 26 – Decision to be made by authorised person](#).

Section 45 – When section 27 to apply

Extract of legislation

45 When section 27 to apply

Section 27 applies in relation to a decision made under this Part refusing to amend a record in like manner as it applies in relation to a decision made under Part III refusing to grant access to a document in accordance with a request made in accordance with section 17.

Guidelines

Reasons for decision

- 1.1. If an agency or Minister refuses to amend a personal record, the agency or Minister must provide a written decision to the claimant in the same form as [section 27](#), as though it were an FOI request.
- 1.2. The decision must include:
 - the reasons for the decision, how the decision was reached, and the facts on which the decision was based;⁶³
 - if the decision was made by an agency, the name and designation of the person who made the decision;⁶⁴ and
 - that the claimant has the right to apply for a review of the decision, to which authority the applicant may make their review application, and the time in which an application for review must be made.⁶⁵

Review of a decision

- 1.3. Where a request to amend personal records has been refused, the claimant may apply to:

⁶³ [Freedom of Information Act 1982 \(Vic\)](#), section 27(1)(a).

⁶⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 27(1)(b).

⁶⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 27(1)(d).

- the Office of the Victorian Information Commissioner for a review of a decision made by an agency or Minister within 28 days from the day after they receive the written notice of the decision;⁶⁶ or
- the Victorian Civil and Administrative Tribunal for a review of a decision made by a principal officer of an agency, Minister, or the Information Commissioner, within 60 days of receiving written notice of the decision.⁶⁷

More information

See the FOI Guidelines on:

- [section 27 – Reasons etc. to be given;](#)
- [section 49A – Applications to Information Commissioner for review;](#)
- [section 50 – Applications for review by Tribunal.](#)

⁶⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 49A(2).

⁶⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 50(3B).

Section 46 – Where request refused

Extract of legislation

46 Where request refused

Where—

- (a) an agency or Minister refuses to amend a record pursuant to a request under section 39;
- (b) the person who made the request applies to the Tribunal for a review of the decision; and
- (c) the Tribunal affirms the decision—

the person who made the request may, by notice in writing, require the agency or Minister to add to the record a notation—

- (d) specifying the respects in which the information is claimed by him to be incomplete, incorrect, out of date or misleading; and
- (e) in a case where the information is claimed by him to be out of date—setting out such information as is claimed to be required to bring up to date or complete the information.

Guidelines

Adding a notation to a record where a request for amendment is refused

- 1.1. Sections 46 and 47 give claimants the power to require an agency or Minister to add a notation to a record where the amendment request was refused. The notation sets out why the claimant believes the information is wrong or misleading and provides up to date information where required.

When can a claimant use section 46?

- 1.2. A claimant may use section 46 where:
 - they make a request under [section 39](#) to an agency or Minister to amend a personal record;
 - the agency or Minister refuses to amend the record under the request;
 - the claimant applies to the Victorian Civil and Administrative Tribunal (**VCAT**) to review the agency or Minister’s decision; and
 - VCAT affirms the agency or Minister’s decision to refuse the request.

Providing notice to an agency or Minister

- 1.3. After VCAT affirms the agency or Minister's decision, the claimant may require, by notice in writing, that the agency or Minister add a notation to the record that outlines why the claimant believes the information is incomplete, inaccurate, out of date, or misleading.⁶⁸
- 1.4. Additionally, if the information is claimed to be out of date, the notation must include information which the claimant believes will bring the information up to date or will make it complete.
- 1.5. Whether or not a particular record is difficult to add a notation to is not relevant for the purpose of sections 46 and 47.⁶⁹

More information

See the FOI Guidelines on:

- [section 39 – Person may request amendment of record;](#)
- [section 47 – Notice to be added to the record;](#)
- [section 50 – Applications for review by the Tribunal.](#)

⁶⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 46.

⁶⁹ [Akers v Victoria Police \(Review and Regulation\) \[2022\] VCAT 1047](#) at [66].

Section 47 – Notice to be added to the record

Extract of legislation

47 Notice to be added to the record

Where a notice is given to an agency or Minister under section 46—

- (a) the agency or Minister shall ensure that a notation as required by the notice is added to the record; and
- (b) if any information in the part of the record to which the notation relates is disclosed to a person (including another agency or Minister) by the agency or Minister, the agency or Minister shall ensure that there is also furnished to that person, with the document containing the information, a statement—
 - (i) stating that the person to whom the information relates claims that the information is incomplete, incorrect, out of date or misleading, as the case may be; and
 - (ii) giving particulars of the notation—

and may, if the agency or Minister considers it appropriate to do so, include in the statement the reasons of the agency or Minister for not amending the part of the record from which the information is taken.

Guidelines

Adding a notation

- 1.1. Section 47 requires an agency or Minister to add a notation to a record where a claimant provides a notice to do so under [section 46](#).

Advising other persons of a notation to a record

- 1.2. Section 47 also helps to ensure other persons to whom the agency or Minister discloses the notated information to, are aware of the notation.
- 1.3. If the agency or Minister discloses any information to which the notation relates to another person (including another agency or Minister), then the agency or Minister must provide that other person with a statement:
 - o stating that the claimant claims the relevant information is incomplete, incorrect, out of date or misleading; and

- o outlining the particulars of the notation.

1.4. In the statement, the agency or Minister may also explain their reasons for not amending the relevant information in the record.

More information

See the FOI Guidelines on:

- [section 46 – Where request refused;](#)
- [section 48 – Notice may be given to persons who received the information prior to commencement of section.](#)

Section 48 – Notice may be given to persons who received the information prior to commencement of section

Extract of legislation

48 Notice may be given to persons who received the information prior to commencement of section

Nothing in this Part is intended to prevent or discourage agencies or Ministers from giving particulars of a notation added to a record in accordance with section 47(a) to a person (including any agency or Minister) to whom information contained in the record to which the notation relates was furnished before the commencement of this section.

Guidelines

An agency or Minister may provide information about a notation

- 1.1. Under section 48, an agency or Minister may, but is not required to, provide information to another person who received the notated information, if that person received the relevant information before Part V commenced on 5 July 1983.⁷⁰

For example, if an agency or Minister provided a record to another person before section 48 commenced, and the agency or Minister is required to make a notation to the record in accordance with section 47(a), then the agency or Minister may provide information about the notation to the other person despite the record being provided before section 48 commenced.

⁷⁰ Under section 47(a), an agency or Minister must provide information about a notation to a record to any person (including another agency or Minister) to whom the agency or Minister discloses the notated information.

Section 49 – How corrections or amendments are made

Extract of legislation

49 How corrections or amendments are made

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.

Guidelines

Forms of amendment

1.1. Forms of correction or amendment of information under Part V include:

- altering the information; or⁷¹
- adding a notation,⁷²

or in limited circumstances:

- deleting or expunging the information;⁷³ or
- destroying the document.⁷⁴

See [section 41](#) and [section 42](#) for information on altering a record and adding a notation.

⁷¹ [Freedom of Information Act 1982 \(Vic\)](#), section 41.

⁷² [Freedom of Information Act 1982 \(Vic\)](#), section 41 and section 42.

⁷³ [Freedom of Information Act 1982 \(Vic\)](#), section 49.

⁷⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 49.

Deleting or expunging information or destroying a document

- 1.2. The purpose of Part V is to ensure personal information in government-held records does not unfairly harm the person to whom it relates. This can often be achieved by altering the information and/or adding a notation to the record.⁷⁵
- 1.3. However, in limited instances, an agency or Minister may correct or amend a record by deleting or expunging information or destroying the document with the agreement of the Keeper of Public Records.⁷⁶
- 1.4. The purpose of section 49 is to maintain the integrity of public records by retaining the original information and annotating the record to correct or update the information in it. It also helps to ensure that any person reading the record, or a file containing the information subject to the amendment, understands whether any information is disputed and why.
- 1.5. Therefore, it will generally not be appropriate to delete or expunge information or destroy a document where the facts are disputed. However, it may be appropriate to alter the record or add a notation which notes the nature of the dispute and includes the differing view.

For example, in [Smeaton v Victorian Workcover Authority \[2009\] VCAT 1977](#), VCAT noted at [32] that it would not be appropriate to completely replace the record subject to amendment in a file because replacement could result in a reader of the file finding it difficult to understand how the amended document came to be on the file. VCAT noted its view that Parliament intended to avoid that result.

- 1.6. Destroying a record has been held to be an 'extreme' form of correction or amendment.⁷⁷

When it may be appropriate to delete or expunge information or destroy a document

- 1.7. Deleting or expunging information in a record or destroying a document may be appropriate where:
 - the information is demonstrably wrong (meaning the information can be capable of being shown or logically proved to be wrong) and provided the Keeper of Public Records agrees to the deletion, expungement, or destruction,⁷⁸

⁷⁵ *Re Foster v Victoria Police* (1989) 3 VAR 110 at page 110.

⁷⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 49.

⁷⁷ *Re Lee and Ministry of Education* (1989) 3 VAR 429.

⁷⁸ *G v Health Commission of Victoria* (Unreported decision, 13 September 1984); The Australian Concise Oxford Dictionary (Fourth ed, 2004) 'demonstrable'.

- failing to do so would unfairly harm the claimant, having regard to the object of Part V and the need to ensure fairness, and provided the Keeper of Public Records agrees to the deletion, expungement, or destruction.⁷⁹

1.8. An agency or Minister must consider each request on its merits, based on the evidence available.

1.9. Before an agency or Minister may delete or expunge information or destroy a document, they must consult with the Keeper of Public Records and receive their agreement to do so.

Case examples

Re Buhagiar v Victoria Police (1989) 2 VAR 530

In *Re Buhagiar*, the Applicant sought to amend reports relating to her that the agency prepared through her unsuccessful application to join Victoria Police.

The reports contained serious allegations about the Applicant, which gave the impression she has a poor reputation, associates with and supports criminals, and has been involved in misconduct including the taking of illicit drugs and brawling.

In summary, the AAT held:

- The reports asserted as unqualified facts matters that were in dispute, as demonstrated by the evidence presented during the matter.
- Given the object of the Act is to ensure that personal information contained in government files do not unfairly harm the person to whom it relates, the records should be amended by expunging a comment from one of the reports (subject to the concurrence of the Keeper of Public Records) and by introducing qualifications to certain misleading statements made in some of the records.
- A notation should be attached to the records stating that the Tribunal determined that the relevant paragraphs contain information that was incomplete and misleading in not disclosing that what were stated as facts about the applicant had not been established as such.

Re Foster v Victoria Police (1989) 3 VAR 110 (VICAAT)

In *Re Foster v Victoria Police*,⁸⁰ the Applicant was a serving member of the agency. He disputed aspects of a written comment made about him by a senior Agency officer which had been entered in his record of conduct and service.

The comment related to the Applicant's work performance and noted:

⁷⁹ *Re Buhagiar v Victoria Police (1989) 2 VAR 530 at 541.*

⁸⁰ *Re Foster v Victoria Police (1989) 3 VAR 110 (VICAAT).*

- unfavourable observations about the Applicant's objectivity and professionalism in a particular investigation; which
- raised the question of his competence as a detective and whether he should be retained in the CIB;
- the Applicant's attitude to disciplinary action was not satisfactory;
- there was doubt as to whether the Applicant should again serve at a higher rank, and the doubt must be addressed if the Applicant applied to serve at a higher rank.

Amongst other things, the AAT held:

- The disputed comment would give a misleading impression about the extent to which the Applicant's career service to date had been satisfactory because the comment placed undue emphasis on one incident which was out of proportion to the Applicant's overall career.
- To some extent, the facts underlying the comment were demonstrated to be totally inadequate and the comment's author was tainted by unconscious bias by giving undue weight to the one particular incident.
- The record to be amended would have a direct effect on the Applicant's career in the Force for as long as he remained a member. The original comment was made by a very senior officer and to remove any possibility of injustice, the original comment should be expunged.

Asking for PROV's authority to delete or expunge

1.10. When amending a document under the Act, an agency or Minister cannot delete information in a document or expunge a document without the Keeper of Public Records' authorisation.⁸¹ This authorisation is done on a case-by-case basis, and it is not automatic.

1.11. An agency or Minister may ask for the Keeper of Public Records' authorisation to delete information or expunge a document by:

- emailing agencyqueries@prov.vic.gov.au;
- providing details of the request (including the information and/or records involved);
- whether the agency or Minister supports the request, and if so, why;
- the harms that the incorrect or misleading information is causing; and

⁸¹ [Freedom of Information Act 1982 \(Vic\)](#), section 49.

- the retention requirements for the records (including the relevant Retention & Disposal Authority and Class and minimum mandatory retention period if known).

For more information on record keeping, visit PROV's website, including:

- 'Privacy and Recordkeeping Obligations' Topic Page: <https://prov.vic.gov.au/recordkeeping-government/a-z-topics/privacy-and-recordkeeping-obligations>; and
- Retention and Disposal Authorities (RDAs), available here: <https://prov.vic.gov.au/recordkeeping-government/how-long-should-records-be-kept/retention-and-disposal-authorities-rdas>.

More information

See the FOI Guidelines on:

- [section 41 – Agency or Minister may amend record;](#)
- [section 42 – Notation on record.](#)

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