

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 45 of 1993
(No. 95005)

Participants:

PETER JOHN BANKS
Applicant

- and -

QUEENSLAND CORRECTIVE SERVICES COMMISSION
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - application for amendment of information pursuant to s.53 of the *Freedom of Information Act 1992 Qld* - report by custodial correctional officer on a prison incident involving the applicant - whether the information in issue concerns the personal affairs of the applicant - whether the information in issue is inaccurate, incomplete, out-of-date or misleading - observations on the extent of the duty imposed on agencies by s.59 of the *Freedom of Information Act 1992 Qld* when an applicant exercises the right to require an agency to add a notation to information which the agency has refused to amend.

Freedom of Information Act 1992 Qld s.53, s.57, s.59, s.79

Doelle and Legal Aid Office (Queensland), Re (1993) 1 QAR 207

Lapidos and Office of Corrections (No. 2), Re (Victorian Administrative Appeals Tribunal, Jones J (President), 19 February 1990, unreported)

Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

I affirm the respondent's (deemed) decision refusing to amend or correct information about the applicant contained in a report dated 30 August 1989 by Mr Robert Ian Williams (former custodial correctional officer) to the General Manager, Woodford Correctional Centre, on the basis that I am satisfied that the information contained in that report is not inaccurate, incomplete, out-of-date or misleading.

Date of Decision: 13 April 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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QUEENSLAND CORRECTIVE SERVICES COMMISSION
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REASONS FOR DECISION

Background

1. This external review arises out of an application by Mr Banks to amend information pursuant to s.53 of the *Freedom of Information Act 1992* Qld (the FOI Act).
2. The applicant's application to amend information, dated 2 February 1993, sought amendment of several pieces of information in several documents. The applicant had obtained access to those documents through an earlier application for access under the FOI Act. My staff pursued investigations into disputed questions of fact, obtaining sworn evidence from a number of witnesses. Following lengthy negotiations with the applicant and relevant officers of the QCSC, all but one of the issues initially raised by Mr Banks' application for review have been resolved by a compromise between the participants on the form of amendments or notations to relevant documents held by the QCSC. The only issue which remains for formal determination concerns certain information in a report dated 30 August 1989 by a former custodial correctional officer, Mr Robert Ian Williams (which will be referred to in these reasons for decision as "the Report").
3. In August 1989, Mr Williams was employed as a custodial correctional officer at the Woodford Correctional Centre. Mr Williams is no longer employed by the QCSC, having left that employment when the Woodford Correctional Centre closed. The document in issue is a handwritten report dated 30 August 1989, slightly more than one page in length, which Mr Williams submitted to the General Manager of the Woodford Correctional Centre. The Report describes an incident at the Woodford Correctional Centre involving the applicant. The Report attributes to the applicant the making of a statement to the effect that the only way that the applicant was likely to obtain a change in his prison job or a change in the prison in which he was detained, was to "smash or hit someone". The events leading up to the making of the statement attributed to the applicant, including an incident with another prisoner, are also described. The incidents occurred in the prison library, of which Mr Williams was the officer in charge.
4. In his initial application to amend information (dated 2 February 1993) the applicant asserted that:

The incident within the report is a fabrication, whether by the prisoner mentioned within the report or the originating officer I do not know or care. I request that if the report cannot be removed that the following note be attached to this report:

"This report is a fabrication and as such should be treated with the contempt it deserves!

5. The FOI Co-ordinator of the QCSC, Ms P Cabaniuk, responded to Mr Banks' application by letter dated 15 March 1993 which, so far as relevant, stated:

Under the Freedom of Information Act 1992, amendments can only be made by either altering the information or adding an appropriate notation to the information. Documents cannot be removed.

You have not provided supporting evidence only facts to the contrary to justify an amendment. These facts must now be substantiated. This matter has been referred to the General Manager so that the matter may be looked into. Should the information on the document be incorrect, then your notations will be added to the file. You will be advised of the result as soon as practicable.

6. Following receipt of that letter, the applicant lodged an application for external review with my office, received on 31 March 1993. I accepted that I had jurisdiction to deal with the application for external review, since the QCSC's letter of 15 March 1993 to Mr Banks did not notify a decision in response to Mr Banks' application for amendment of information. The 30 day time limit for giving that notification having then expired (see s.57 of the FOI Act), Mr Banks was entitled to apply to me for review, in accordance with s.79 of the FOI Act, on the basis of a deemed refusal of his application for amendment of information.

Notations under s.59 of the FOI Act

7. After receiving notification of the commencement of my review, the QCSC's FOI Co-Ordinator informed me that the applicant had made a request (undated) that a number of documents (including the Report) be notated pursuant to s.59 of the FOI Act, which provides:

59.(1) In this section -

"agency" includes a Minister.

(2) If an agency has refused to amend information, the applicant may, whether or not the applicant has applied to the Commissioner for review of the decision, by written notice, require the agency to add to the information a notation -

(a) specifying the respects in which the applicant claims the information to be inaccurate, incomplete, out-of-date or misleading; and

(b) if the applicant claims the information to be incomplete or out-of-date - setting out such information as the applicant claims is necessary to complete the information or to bring it up-to-date.

(3) An agency must comply with the requirements of a notice under this section, and must cause written notice of the nature of the notation to be given to the applicant.

(4) If an agency discloses to a person (including another agency and a Minister) any information contained in the part of its documents to which a notice under this section relates, the agency -

- (a) *must ensure that there is given to the person, when the information is disclosed a statement -*
 - (i) *stating that the person, or next of kin of the person, to whom the information relates claims that the information is inaccurate, incomplete, out-of-date or misleading; and*
 - (ii) *setting out particulars of the notation added under this section; and*
- (b) *may include in the statement the reason for the agency's refusal to amend the information as requested.*

(5) This section is not intended to prevent or discourage agencies from giving particulars of a notation added to its documents under this section to a person (including another agency and a Minister) to whom information contained in the documents was given before the commencement of this section.

8. In his application for notations to be made under s.59, Mr Banks made the following remarks in respect of the Report now in issue:

It is much easier to fabricate an incident to effect the removal of an unwanted inmate, than to wait for one. The alleged incident revolved around my self being Shanghaied to Woodford and being put into a cushy job to appease me in working with two other inmates. There was not enough work to keep two people busy let alone three, and one of the other prisoners (The senior worker) resented someone (Me) being put to work in his library without him being consulted. I was not even shown how to do anything in the library even when I asked. I was later terminated without explanation and had only become aware of the alleged incident when I read the material resulting from an FOI request.

This, together with the comments I outlined in my amendment request dated 2/2/93 should be attached.

9. I note that, apart from repeating his earlier allegation that the Report involves some kind of fabrication, the applicant has not specified whether all, or part (and if so, which part(s)) of the Report, is claimed to be a fabrication. Mr Banks sets out his version of conditions in the prison library, at the time his prison job was to work in the prison library, in terms which indicate he was disenchanted with that job, and he was not well received by other prisoners working in the library; but he does not acknowledge that the "alleged incident" occurred.
10. In a letter dated 24 May 1993, the QCSC's FOI Co-Ordinator informed me that the notations requested by Mr Banks had been made and a copy of the form in which the notations were made was provided to me. They were made by way of a handwritten paragraph (dated 23 April 1993) being placed on the Report which refers any reader of the Report to notations attached to the Report, being notations in the form requested by the applicant. The QCSC's FOI Co-Ordinator also forwarded to me a copy of a letter she sent to the applicant, dated 23 April 1993, which informed the applicant, as required by s.59(3) of the FOI Act, that the notations had been made.
11. During the course of this external review, Mr Banks raised, as an issue, the necessity for the QCSC to notate each copy of the Report which is in the possession or control of the QCSC, in any location. A particular document may appear in a number of different files in the possession or control of an agency such as the QCSC, because copies of the same document may be required for different administrative purposes in various locations. In my opinion, it clearly accords with the objects of

Part 4 of the FOI Act that, when an applicant exercises the statutory right under s.59 to require that certain information in a document be notated, the agency concerned has a corresponding duty to notate all copies of the relevant document which are in its possession or control. The purpose of s.59 would not be fulfilled if an agency's duty were to be regarded as any less onerous than I have indicated.

The external review process

12. The fact that the QCSC notated the document in issue in accordance with the applicant's request under s.59 does not affect the applicant's entitlement to seek external review of the QCSC's deemed refusal to amend or correct the document in issue.
13. Since the applicant disputed the veracity of the Report, the issue for determination essentially became one of establishing whether the credibility of Mr Williams' account was to be preferred to that of Mr Banks, or vice-versa. A member of my staff interviewed Mr Williams to obtain his account of relevant events. Mr Williams was provided with a copy of the Report, and informed of the applicant's allegations that the incident described in the Report was a fabrication. Mr Williams subsequently completed a statutory declaration dated 25 February 1994. The relevant parts of Mr Williams' statutory declaration are as follows:

On 30 August 1989, I was the Custodial Corrections Officer responsible for the library at the WCC (Woodford Correctional Centre). On that day, I observed the events that I have recorded in the attached report. I say that the contents of the report are true and correct in every respect. In particular, I recall Mr Banks saying to me that the only way he was going to get out of the prison is to "smash or hit someone". The words "smash or hit someone" are the actual words that Mr Banks used. I was the only prison officer in the library at the time, and there are no other prison officers who would have witnessed Mr Banks using those words. I was letting Mr Banks out of the library when he made the comment that the only way he was going to get out of the prison was to "smash or hit someone". In order for a prisoner to move from the library to another part of the prison, it was necessary for me, as the prison officer in charge of the library to let a prisoner out by unlocking the gates. When I was in the process of doing that and allowing Mr Banks out of the library area and he made the comment to me that the only way that he was going to get out of the prison was to "smash or hit someone", there was only himself and myself in the area.

The report attached to this statutory declaration and marked "A" was made by me on the same day that the incident occurred, namely 30 August 1989. It is necessary for me to make a report such as this on the day that it occurs prior to my finishing duty for the day. ...

The purpose of my making the report attached to this statutory declaration was to ensure that other prison officers in the prison were aware of the incident and to make the other prison officers aware that Mr Banks had made this comment, with a view to protecting other prison officers from any injury that might occur to them caused by Mr Banks. The report did not result in any charges against Mr Banks and that was not the purpose of the report. The purpose of the report was to warn other prison officers that the incident had occurred. It was part of my duties as a Custodial Corrections Officer to record incidents such as the incident described in the report.

14. On 14 April 1994, the Deputy Information Commissioner forwarded a copy of Mr Williams'

statutory declaration to the applicant. The applicant was asked to indicate whether he contested the accuracy of the entire Report, or whether he only wished to contest the comment attributed to him that:

The only way that I'm going to get out of here is to "smash or hit someone".

15. In that letter, the applicant was given the opportunity to lodge any evidence or submissions on which he wished to rely to support his case in this external review (which at that stage still involved issues relating to the amendment of other information in other documents). Mr Banks subsequently forwarded a nine page submission which referred in detail to the other matters which were then in issue (and have since been resolved) but which made no reference to Mr Williams' Report.
16. The QCSC was also provided with a copy of Mr Williams' statutory declaration and was given the opportunity to lodge evidence and a written submission concerning the Report, as well as the other issues then remaining in this external review. The QCSC provided a short written submission to my office dated 27 October 1994, indicating that the QCSC was not prepared to amend the Report for the following reasons:
 - (a) *Initial section 51 consultation with the author revealed that the report was accurate and not misleading.*
 - (b) *Statutory Declaration by author supports above.*
 - (c) *No other witnesses present in library to support applicant's allegations of report being false.*
 - (d) *The report was written on same day of incident. The incident would have been fresh in the Officers' mind.*
 - (e) *The applicant has not addressed or challenged the contents of this Statutory Declaration, nor has he provided one to the Information Commissioner.*

Principles applicable to an application to amend information

17. The provision of the FOI Act which entitles a person to apply to have information amended is s.53:

53. If a person has had access to a document from an agency or Minister (whether or not under this Act) containing information relating to -

 - (a) *the person's personal affairs; or*
 - (b) *the personal affairs of a deceased person to whom the person is next of kin;*

the person is entitled to apply to the agency or Minister for correction or amendment of any part of the information if it is inaccurate, incomplete, out-of-date or misleading.

18. I discussed the principles applicable to an application to amend information pursuant to Part 4 of the FOI Act in my decision in *Re Doelle and Legal Aid Office (Queensland)* (1993) 1 QAR 207. (A copy of that decision was provided to the applicant under cover of the Deputy Information Commissioner's letter of 14 April 1994, in which the opportunity was extended to the applicant to lodge evidence and submissions in support of his case in this external review.)

19. In his application to amend information, Mr Banks indicated that he wanted the information that he considered to be inaccurate, incomplete, out-of-date or misleading (including Mr Williams' Report) to be destroyed. At paragraphs 61-63 of my decision in *Re Doelle*, I held that the words "correction or amendment" in s.53 of the FOI Act do not authorise the destruction of documents or removal of documents from files, even if information contained in the documents is established to be inaccurate, incomplete, out-of-date or misleading. On the facts of this case, therefore, even if the applicant were to succeed in demonstrating that all or part of the Report is inaccurate, incomplete, out-of-date or misleading, s.53 of the FOI Act would not permit the Report to be destroyed or removed from the relevant file(s) of the QCSC.
20. At paragraph 16 of my decision in *Re Doelle*, I said:

Prior to considering the form which any correction of, or amendment to, information in a document of an agency or Minister may take, the following elements of s.53 of the FOI Act must be satisfied:

- (a) *the applicant must have had access to a document of an agency or Minister, whether under the provisions of the FOI Act or otherwise;*
- (b) *the document must contain information relating to the applicant's personal affairs, or the personal affairs of a deceased person to whom the applicant is next of kin; and*
- (c) *the information or some part of the information referred to in (b) must be inaccurate, incomplete, out-of-date or misleading.*

Application of the relevant principles to this case

21. In this case, it is clear that the applicant has had access to the Report in issue, under the FOI Act. I am also satisfied that the second element of s.53 is established in that the information contained in the Report concerns Mr Banks' personal affairs. I considered the meaning of the term "personal affairs" in detail in my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227. At paragraph 80 of *Re Stewart*, I expressed agreement with the opinion of Jones J (President) of the Victorian Administrative Appeals Tribunal in *Re Lapidos and Office of Corrections (No. 2)* (19 February 1990, unreported) to the effect that information concerning what happens to a prisoner while in prison is ordinarily to be characterised as information which concerns the prisoner's personal affairs.
22. The key issue in this case is whether the third element of s.53 is satisfied. Pursuant to s.81 of the FOI Act, the QCSC has the onus of establishing that its refusal to amend or correct the Report was justified. To discharge its onus, the QCSC must establish, on the balance of probabilities, that the information in the report, which the applicant seeks to amend or correct, is not inaccurate, incomplete, out-of-date or misleading.
23. In his initial application to amend information (dated 2 February 1993), the applicant asserted that:
- The incident within the report is a fabrication, whether by the prisoner mentioned within the report or the originating officer I do not know or care.*
24. This gives rise to some confusion, since the Report describes an earlier incident which occurred between the applicant and another prisoner, as well as the later incident in which the applicant is

said by Mr Williams (at a time when only the applicant and Mr Williams were present) to have uttered words to the effect that the only way that he (Banks) was "going to get out of here" was to "smash or hit someone". I do not see how it could be suggested that the other prisoner could have fabricated the second incident, since Mr Williams was reporting words which he claimed to have himself heard. This suggests that the incident which Mr Banks is alleging to be a fabrication may be the earlier incident involving another prisoner working in the prison library. At no stage has Mr Banks clarified whether it is the first incident, the second incident, or both, which he claims to be a fabrication. However, I consider that the second incident must be the one which is of concern to the applicant, since there is really nothing in the first incident which reflects adversely on the applicant. The first incident (which in essence merely involved another prisoner, whose job it was to work in the library, expressing annoyance that the applicant had also been instructed to work in the library, because there were already too many prisoners working in the library) is actually entirely consistent with the remarks made by Mr Banks in his application for notations to be made under s.59 of the FOI Act: see paragraphs 8-9 above. That incident, considered on its own, was quite trivial. I find it difficult to accept that anyone could have a motive for fabricating a report of an incident of that nature. Moreover, Mr Banks' remarks set out in paragraph 8 above support the credibility of Mr Williams' account of the first incident. I am satisfied that the first three paragraphs of the Report, which record the first incident, are not inaccurate, incomplete, out-of-date or misleading.

25. The second incident is somewhat more serious in nature. The tenor of the Report is that Mr Williams saw fit to record an observation uttered by the applicant, for what it indicated about the applicant's attitude to his circumstances, of which the prison authorities ought to be aware. No suggestion is made in the Report, however, that the applicant made a specific threat against any individual, or appeared likely to take some action that involved smashing or hitting someone.
26. In respect of the second incident, I have had regard to the fact that Mr Banks' application for amendment was prompted by his receipt, early in 1993, of a document of which he had previously been unaware, which attributed to him the making of certain remarks (which would undoubtedly have reflected on him unfavourably in the eyes of prison officers and prison managers) in an incident which occurred some three and a half years earlier, and which was not likely to have impressed his mind at that time as a particularly significant event. In my opinion, Mr Banks' recall of what occurred on the day in question is likely to be less reliable than the account given in Mr Williams' Report which was recorded on the same day. The fact that a report is made contemporaneously with the events it describes does not necessarily mean that it cannot be inaccurate, incomplete, out-of-date or misleading. However, the contemporaneity of Mr Williams' Report is a factor, with the others noted below, which leads me to prefer Mr Williams' account of relevant events. Mr Williams has been interviewed by a member of my staff and has declared (under the *Oaths Act 1867 Qld*) that the contents of the Report are true and correct. Mr Williams no longer has any connection with the QCSC. He was found to be a credible and reliable witness concerning the contents of his statutory declaration. On the balance of probabilities, I am satisfied that the information contained in the Report is not inaccurate, incomplete, out-of-date or misleading.

Conclusion

27. By virtue of its failure to make a decision within thirty days after receipt of the applicant's application to amend information, the QCSC is deemed to have made a decision refusing to amend each of the documents which were the subject of the applicant's amendment application. Since the application for review related to documents other than the Report, and those issues were resolved informally during the course of this external review, it is not appropriate that I merely affirm the deemed refusal to amend documents in accordance with the applicant's initial application for amendment under s.53. I will affirm only that part of the decision under review which relates to Mr Banks' application for amendment or correction of Mr Williams' Report dated 30 August 1989.

F N ALBIETZ
INFORMATION COMMISSIONER