



Decision and Reasons for Decision

Citation:	<i>U5OR8D and Department of Justice and Attorney-General [2018] QICmr [18] (19 April 2018)</i>
Application Number:	313695
Applicant:	U5OR8D
Respondent:	Department of Justice and Attorney-General
Decision Date:	19 April 2018
Catchwords:	ADMINISTRATIVE LAW - AMENDMENT OF PERSONAL INFORMATION - application to amend information contained in a letter authored by a non-government, private sector entity - information relating to issues arising under the <i>Retirement Villages Act 1999 (Qld)</i> about the management and operation of a Retirement Village - whether record of information is inaccurate, incomplete, out of date or misleading - section 72 (1)(a)(i) of the <i>Information Privacy Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Justice and Attorney-General (**Department**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for amendment of information contained in a letter addressed to the Queensland Civil and Administrative Tribunal (**QCAT**) from a Retirement Village Operator dated 25 January 2014 (**the Letter**).
2. The Department decided² to refuse the amendment request on the basis that the information sought to be amended is not inaccurate, incomplete, out of date or misleading.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.³
4. For the reasons set out below, I affirm the Department's decision to refuse the applicant's requested amendments.

¹ Amendment application dated 21 October 2017.

² Decision dated 18 December 2017.

³ External review application received by OIC on 9 January 2018.

Background

5. The appendix to these reasons for decision sets out the significant procedural steps taken during the external review.

Reviewable decision

6. The decision under review is the Department's decision dated 18 December 2017.

Evidence considered

7. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Issues in the review

8. The issues to be determined in this external review are:
 - whether the applicant has demonstrated that the information sought to be amended is inaccurate, incomplete, out of date or misleading; and, if so
 - whether, under section 72(1) of the IP Act, amendment of the information may still be refused.

Relevant law

9. Under the IP Act, an individual has a right to apply for amendment of a document of an agency, or Minister, containing the individual's personal information where the following requirements are satisfied:⁴
 - a) the applicant has previously obtained access to the document said to contain the applicant's personal information
 - b) the information which the applicant seeks to amend is the applicant's personal information;⁵ and
 - c) the personal information is inaccurate, incomplete, out of date or misleading.
10. Where disputed information comprises an individual's interpretation of events or issues, an applicant seeking amendment must establish not only that the relevant information inaccurately, incorrectly or misleadingly represents the underlying events or issues, but that the authoring individual had not actually held and accurately entered into the official record their particular understanding of those events.⁶
11. The term '*misleading*' is not defined in the IP Act. The ordinary dictionary definition⁷ of '*mislead*', as set out below, is therefore relevant:
 1. *to lead or guide wrongly; lead astray.*
 2. *to lead into error of conduct, thought or judgement.*
12. Satisfaction of the preceding requirements does not itself entitle an applicant to amendment. Due to the opening words of section 72(1) of the IP Act—*[w]ithout limiting*

⁴ Sections 41 and 44 of the IP Act.

⁵ '*Personal information*' is defined in section 12 of the IP Act as '*Information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion*'.

⁶ *A4STL6K and Queensland Health* (Unreported, Queensland Information Commissioner, 6 September 2013) at [27], paraphrasing the relevant principle as stated in *Crewdson v Central Sydney AHS* [2002] NSWCA 345 at [34].

⁷ Online Macquarie Dictionary: www.macquariedictionary.com.au (accessed 4 April 2018).

the grounds on which the agency or Minister may refuse to amend the document', a decision-maker may still refuse to amend a relevant document—this provision confers on a decision-maker discretion whether to grant or refuse an amendment application. While the section sets out specific grounds on which amendment may be refused, the decision-maker is not limited solely to those grounds. Consequently, even where an applicant has satisfied each of the requirements noted above, discretion is retained to refuse to amend a relevant document.

13. While an agency has the onus of establishing that its decision was justified,⁸ in an external review of a decision to refuse to amend information:⁹

... a practical or evidentiary onus shifts to [an applicant] to provide evidence to support [their] entitlement to relief under [the IP Act] on the basis that the documents in issue contain information that is inaccurate, incomplete, out-of-date or misleading.

Findings

14. It is not in contention that the applicant has previously obtained access to the Letter and that the information the applicant seeks to amend comprises her personal information.
15. The applicant disputes the contents of the Letter which sets out the Retirement Village Operator's concerns in relation to a matter then before QCAT as follows:

[The Retirement Village Operator] wish to seek direction and any provisions of QCAT in [the Retirement Village Operator]'s ability to respond to [the applicant] given [the applicant]'s claims of disability preventing opportunity for face to face mediation.

On 10th February 2014 ... (Village Manager) and myself, representing [the Retirement Village Operator], attended mediation ... for what [the Retirement Village Operator] believed as being prematurely actioned given [the applicant] had failed to respond to our prior requests for clarification and hence discussion to the items [the applicant] believed were in dispute.

At commencement of mediation [the applicant] disclosed disability to the mediator and we were then only able to proceed via shuttle mediation which was extremely restrictive and did not enable [the Retirement Village Operator] opportunity to understand [the applicant]'s application.

We now note that [the applicant] has filed:

Form 40 Application for miscellaneous matters ... on 10/02/14; and

Form 31 Application for a tribunal hearing ... on 14/02/14.

On both applications [the Retirement Village Operator] believe [the applicant] has not been clear or consistent in what she states as being in dispute. We also note that on [the applicant]'s Form 31 Application for Tribunal hearing it is noted "Consideration needs to be given to my stress disability evident upon prevarication"

We appreciate your considered response to enable [the Retirement Village Operator] to deal with this matter.

16. In the amendment application to the Department, the applicant stated the following:¹⁰

1. *Face to face mediation did occur ... resulting in a Service Charge Agreement not to increase my monthly services fees for 5 years under [the Retirement Village Operator]'s business*

⁸ Section 100(1) of the IP Act.

⁹ *Doelle and Legal Aid Office (Qld)* (1993) 1 QAR 207 [18], where the Information Commissioner considered the issue of onus in an equivalent context under the now repealed *Freedom of Information Act 1992* (Qld). In *3DT2GH and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 26 November 2012) (**3DT2GH**) I found this reasoning to be applicable to the provisions of the IP Act.

¹⁰ The applicant indicated that items 1 to 4 were inaccurate or misleading whereas item 5 was out of date or incomplete.

model where there is widespread non-compliance with the Retirement Villages Act 1999 allowed by Dept of Housing & Public Works.

2. *... Caxton Legal has a record of discussions which continue to break down under [the Retirement Village Operator]'s business practices.*
 3. *Mediation is conducted by shuttle.*
 4. *[the Retirement Village Operator] will continue to deny, defy & decry applications for compliance with the Act.*
 5. *It is necessary for Dept of Housing & Public Works or a Housing Commissioner to conciliate [the Retirement Village Operator]'s full compliance with the Act before QCAT.*
17. The applicant numbered each of the paragraphs of the Letter one to five and provided an additional letter with some notes, underlining and some words circled. Although the Department's decision-maker addressed each of the numbered statements and paragraphs, they noted that it was unclear in all but one instance what exactly the applicant was seeking to amend and how. I agree that this is the case.
18. An applicant seeking amendment under the IP Act, must comply with a number of statutory requirements, including that the application must:¹¹
- ...
- (e) *state the way in which the applicant claims the information to be inaccurate, incomplete, out of date or misleading and the grounds for the applicant's claim; and*
 - (f) *if the applicant claims the information to be inaccurate or misleading—state the amendments the applicant claims are necessary for the information to be accurate or not misleading; and*
 - (g) *if the applicant claims the information to be incomplete or out of date—state the other information the applicant claims is necessary to complete the information or to bring it up to date.*
- ...
19. If a person purports to make an amendment application which does not comply with all of the requirements, the IP Act details a process for assisting the applicant to make a compliant application, and, if the agency is not satisfied the application has become compliant, for issuing a decision that the application is non-compliant. In this case the decision-maker, notwithstanding their concerns, endeavoured to address each of the matters raised by the applicant. I have therefore not considered these issues further in this decision.
20. I have carefully considered the information the applicant seeks to have amended and the applicant's statements at paragraph 16 above. I understand from these statements that the applicant does not agree with how the author of the Letter has documented their concerns in relation to the proceeding then before QCAT and the applicant is seeking to substitute their understanding of what occurred and how the matter should be resolved. Such contentions misapprehend the ambit of the amendment provisions of the IP Act.
21. Amendment provisions such as those found in the IP Act are aimed at:
- ... ensuring that personal information concerning an applicant and read by third persons, does not unfairly harm the applicant or misrepresent personal facts about the applicant. It is concerned that the third persons reading the personal information do not get the wrong impression ...*¹²

¹¹ Section 44(4) of the IP Act.

¹² *Buhagiar and Victoria Police* (1989) 2 VAR 530, per Jones J.

22. The Letter sets out the author's understanding of various matters relevant to QCAT's process and seeks direction and information regarding their organisation's response. The very nature of the Letter, that is, statements comprising the opinion or understanding of a non-government party to a matter in dispute with the applicant in a Tribunal, is such that it is not the type of record amendment of which the IP Act contemplates (I discuss this further below). Whilst I acknowledge that the applicant has a different view about the matters considered in the Letter, this is not sufficient to satisfy the requirements to amend a document under the IP Act.
23. To enliven the right to have the requested amendments considered, it must be demonstrated, on the balance of probabilities, that the statements contained in the Letter are inaccurate, incomplete, out of date or misleading. In this circumstance, given the nature of the information the applicant seeks to amend, that is, the author of the Letter's understanding of relevant matters, the applicant would need to establish that the author did not actually hold these views.¹³ The applicant has not established that this is the case.
24. For these reasons, I find that:
- the information the applicant seeks to amend in the Letter is not inaccurate, incomplete, out of date or misleading; and
 - the amendment application may be refused under section 72(1)(a) of the IP Act.

Accordingly the discretion to consider whether to refuse to amend is not enlivened, and I am not required to consider these amendment requests further. Notwithstanding this, for completeness, I address the discretion at paragraphs 27 to 32 below.

25. During the course of the external review, the applicant provided a submission¹⁴ seeking a further amendment:

Purely Factual Personal Information.

It is impossible and wrong for [the Retirement Village Operator] Subject Letter to QCAT to have been written on 25 January 2014 because the author ... Operations Manager Retirement Living ... refers to ... Retirement Village Dispute completed mediation on 10 February 2014. [The Retirement Village Operator] Subject Letter was received at QCAT Brisbane on 28 February as stamped on [the Retirement Village Operator] Letter.

[The Retirement Village Operator] Authored Subject Letter could only definitely have been written between 11 February and 27 February 2014 to deliberately mislead the Tribunal.

Your premise [the letter] date is inaccurate, incomplete as the date can only be 16 days in February, deliberately misleading and out of date in persuading the Tribunal to dismiss my applications.

History has been re-written in maintaining the false date and has destroyed the integrity of the Tribunal process.

26. This request did not form part of the applicant's amendment application and therefore cannot be considered as part of this review.¹⁵ Notwithstanding this, I make the following observations about this request. The copy of the Letter attached to the amendment application is dated '25th January 2014' and stamped as being received by QCAT on 28 February 2014. I acknowledge that the contents of the Letter refer to a mediation having occurred on 10 February 2014. Therefore, it appears that the date of '25th January 2014' on the Letter is incorrect. However, even if the date of the letter is incorrect, it is nonetheless a correct record of the Letter as received by QCAT from the

¹³ Even if the author were mistaken in their views, and I note here that there is nothing before me to suggest that this is the case, this alone would not justify amendment.

¹⁴ Dated 23 February 2018.

¹⁵ In any event, this information is not the applicant's personal information, and as such, would not be amenable to amendment.

Retirement Village Operator. As noted in *3DT2GH* 'incorrect information can be recorded correctly, without giving rise to amendable error.'¹⁶

27. As stated at paragraph 12 above, even where there is objective evidence to support an applicant's contention that information is inaccurate, incomplete, out of date or misleading, this would merely enliven my discretion to consider the requested amendment. There are a number of considerations a decision-maker may appropriately take into account in determining whether or not to exercise the discretion to amend a record of information.

28. In *3DT2GH* I noted that the Information Commissioner has previously recognised the relevance of the following criteria when considering whether the discretion should be exercised:¹⁷

- (a) *the character of the record, in particular whether it purports to be an objective recording of purely factual material or whether it merely purports to be the record of an opinion/report of one person;*
- (b) *whether the record serves a continuing purpose;*
- (c) *whether retention of the record in unamended form may serve a historic purpose;*
- (d) *whether the record is dated;*
- (e) *whether amendment is being sought as a de facto means of reviewing another administrative decision;*
- (f) *the extent to which access to the record is restricted;*
- (g) *whether creation of the record or any of its contents was induced by malice.*
- (h) *whether the record is part of a group of records and, if so, whether the other records modify the impact of the record in dispute.*

29. Further, previous decisions of OIC and other Australian jurisdictions¹⁸ establish that in considering whether to exercise the discretion to refuse to amend information, a decision-maker may take into account that it is not the purpose of the amendment provisions to:¹⁹

- *re-write history, as this destroys the integrity of the record-keeping process;*
- *determine disputed questions of opinion (including expert opinion), when that opinion was actually held and accurately entered in the official record;*
- *re-write a document in words other than the author's;*
- *review the merits or validity of official action;*
- *correct any perceived deficiencies in the work undertaken by agencies or re-investigating matters.*

30. I am satisfied that amending the Letter in accordance with the applicant's request would not be appropriate. Not only would it destroy the integrity of a public record, which forms part of a dispute resolution process, it would also artificially substitute the applicant's views for the stated concerns and views of the document's author. It is clear from the applicant's requests and submissions that the applicant remains aggrieved about matters that were in dispute with the Retirement Village Operator. However, as previously noted, the focus of the amendment provisions of the IP Act is ensuring that personal information concerning an applicant and read by third persons, does not unfairly harm the applicant or misrepresent personal facts about the applicant. The amendment provisions of the IP Act cannot be used to determine disputed questions of opinion when that opinion was held by the author and the record merely reflects this, as is the case

¹⁶ Citing *Cox and Department of Defence* (1990) 20 ALD 499 (**Cox**) at 502-503.

¹⁷ As noted in, for example, *Shaw and Medical Board of Queensland* (Unreported, Queensland Information Commissioner, 3 July 2008), at paragraph [41], quoting with approval the decision of Deputy President Todd of the Administrative Appeals Tribunal in *Cox* at 502-503.

¹⁸ Applying substantially similar legislative provisions.

¹⁹ *3DT2GH* at paragraph [18]. Footnotes omitted.

here. Permitting amendment of the Letter would, in my view, distort the overall record of what in fact transpired during the process, and as already noted, it is not the purpose of the amendment provisions of the IP Act to permit a re-writing of history.

31. In *3DT2GH*, a matter in which the applicant sought review of the agency's decision refusing to amend an agency letter addressed to the applicant, I stated that:²⁰

To replace words actually used by the authoring officer with the text sought by the applicant would result in a contrived document containing invented contents, essentially putting words into the mouth of the author in a manner that would distort the official historical record. This alone would, in my view, justify an exercise of the discretion to refuse to amend the Letter in terms as requested by the applicant.

32. These comments are also pertinent in this matter. I consider that amending the Letter in accordance with the amendment application would amount to re-writing it in the applicant's words, rather than the author's words in an effort to override the stated concerns and views of the Retirement Village Operator, in a circumstance where disputed issues were being ventilated in a legal process.
33. I do not consider the content of the Letter to be inaccurate, incomplete, out of date or misleading, and in any event, I consider that, in the circumstances of this case, the amendment request can be refused.

DECISION

34. For the reasons set out above, I affirm the Department's decision to refuse to amend the Letter under section 72(1)(a)(i) of the IP Act, on the basis that the information the applicant seeks to amend is not inaccurate, incomplete, out of date or misleading.
35. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Suzette Jefferies
Acting Assistant Information Commissioner

Date: 19 April 2018

²⁰ At paragraph 51.

APPENDIX

Significant procedural steps

Date	Event
9 January 2018	OIC received the applicant's application for external review.
30 January 2018	OIC received information relevant to the application from the Department.
21 February 2018	OIC accepted the application for external review and conveyed a preliminary view to the applicant, inviting the applicant to provide submissions by 7 March 2018.
23 February 2018	OIC received a submission from the applicant.