

Participants:

DOUGLAS JAMES DOELLE  
Applicant

- and -

LEGAL AID OFFICE (QLD)  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - application for amendment of documents under Part 4 of the *Freedom of Information Act 1992 (Qld)* - burden of proof - whether the documents contained information that was inaccurate, incomplete, out-of-date or misleading for the purposes of s.53 of the *Freedom of Information Act 1992 (Qld)*.

FREEDOM OF INFORMATION - whether amendment of information under Part 4 of the *Freedom of Information Act 1992 (Qld)* extends to the destruction or disposal of documents -the proper construction of ss.53 and 55 of the *Freedom of Information Act 1992 (Qld)* - words and phrases: "altering"; "correction".

*Freedom of Information Act 1992 (Qld)* s.5(1)(c), s.53, s.55, s.81  
*Libraries and Archives Act 1988 (Qld)* s.50, s.55  
*Freedom of Information Act 1982 (Vic)* s.39, s.49  
*Freedom of Information Act 1982 Cth* s.48, s.50(1), s.50(3)

*QAI and Secretary to the Department of Social Security* (Unreported, Commonwealth AAT Decision No. Q88/263, 9 August 1989)  
*Wade Ewart Cox and Department of Defence* (Unreported, Commonwealth AAT Decision No. A89/26, 2 February 1990)  
*Re Gordon and Department of Social Security* (1991) 25 ALD 327  
*Re Wiseman and Department of Transport* (1984) 12 ALD 707  
*G v Health Commission of Victoria* (Unreported decision of Rendit J, County Court of Victoria, 13 September 1984)  
*Re Stephens and Victoria Police* (1988) 2 VAR 236  
*Re Buhagiar and Victoria Police* (1989) 2 VAR 530  
*Re Lee and Ministry of Education* (1989) 3 VAR 429

**DECISION**

1. The decision under review is affirmed on the basis that it has not been established that any part of the information contained in the documents in issue is inaccurate, incomplete, out-of-date or misleading so as to entitle the applicant to apply for amendment or correction of the information in accordance with s.53 of the *Freedom of Information Act* 1992 (Qld).
  
2. The decision under the review is also affirmed on the alternative basis that removal or destruction of the documents in issue, as requested by the applicant, is not a method of amending information which can be required of the respondent under s.55 of the *Freedom of Information Act* 1992 (Qld).

Date of Decision: 24 November 1993

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**INFORMATION COMMISSIONER**

OFFICE OF THE INFORMATION )  
 COMMISSIONER (QLD) )

S 19 of 1993  
 (Decision No. 93005)

Participants:

DOUGLAS JAMES DOELLE  
 Applicant

- and -

LEGAL AID OFFICE (QLD)  
 Respondent

### REASONS FOR DECISION

#### Background

- 1 On 19 November 1992 Mr D J Doelle made application to the Legal Aid Office (Qld) (Legal Aid) under s.25 of the *Freedom of Information Act* 1992 (Qld) (hereinafter referred to as the FOI Act or the Queensland FOI Act) for access to all files and other material in the possession of Legal Aid which related to Mr Doelle.
- 2 On 8 December 1992, Mr Doelle was granted access to the files in the possession of Legal Aid which related to him.
- 3 Following Mr Doelle's inspection of those files, he made a further application to Legal Aid on 23 December 1992, requesting that certain documents be removed from the files. The basis on which Mr Doelle made his request was that the documents "should not have been put there in the first place". The thrust of his objections in relation to most of the documents was that they were not relevant to the particular file in question. In some instances, Mr Doelle also asserted that the documents contained matter that was "incorrect".
- 4 By letter dated 6 January 1992, Ms R Coxon of Legal Aid determined to refuse Mr Doelle's request for amendment. In doing so, she referred to s.53 and s.55 of the FOI Act and advised Mr Doelle of her decision as follows:

*"I have therefore decided that, in accordance with the Freedom of Information Act, I am prepared to place a copy of your letter in relation to each individual file on the inside file cover of each file, with the exception of File Number B91A05762, which has been returned to State Archives. As this file is no longer current and has been returned to State Archives, I believe that there would be no purpose in having this file returned to us, to insert a copy of this information on the file, as it is unlikely that the file will ever be reactivated again. Additionally, there is a \$14.00 charge from State Archives for the retrieval of the file, which charge we have already paid once."*

- 5 Upon Mr Doelle's request, an internal review was conducted by Ms E Hayward of Legal Aid. In her decision of 19 January 1993 Ms Hayward referred to s.55 of the FOI Act and stated as follows:

*"There is not an option of having material removed from the file."*

*In addition, the Library and Archives Act 1988 as amended sets out the details of destruction of public documents. This would require the approval of the State Archivist. The Legal Aid Office does not have this approval and therefore I have decided, in accordance with the Freedom of Information Act, not to accede to your request for the removal of personal documents from your files."*

- 6 Ms Hayward also advised Mr Doelle that his letter dated 23 December 1992 had been placed on the relevant files.

### **The Review Process**

- 7 Mr Doelle lodged an application, dated 26 February 1993, for external review of Ms Hayward's decision. Mr Doelle's application was in the following terms:

*"I am writing to you to ask you to have Mr [M's] personal letters removed from my file number B92A03490 at Legal Aid, as they have nothing at all to do with my Legal Aid application.*

*The page numbers are as follows;*

*Pages 111 to 153, 167 to 177, 180 to 190 and 197 to 208. Taking note of page 149 where the Legal Aid of Queensland had been crossed out by whoever did the draft letter for [M]. That makes it quite clear that the Legal Aid of Queensland is saying that it is [M's] letter and not theirs.*

*Also there are other things that I want removed from this same file as they should not be on my Legal Aid application. The pages and the reasons are as follows;*

#### **PAGES**

*13 and 13 with a cross through it (~~13~~) have nothing to do with this file.*

*13 (~~13~~) that has been crossed out has been signed with my signature, but I did not do the signature. Some one has used my signature. I always sign my name as D.J. Doelle and never sign DJD.*

*28 to 31 : Has nothing to do with this file.*

*38 to 39 : Is a letter to Legal aid from the Ombudsman.*

*45 to 52 : Letters out of other files and are not really related to this file. By them being placed in this file, you can say that I was and still am being DISCRIMINATED against when anyone reads the file.*

*53 to 64 : Letters to the Ombudsman from Legal Aid and letters to Legal Aid from the Ombudsman.*

*90 to 94 : Nothing to do with this file.*

*96 to 110 : Letters to the Attorney-General from Legal Aid.*

*I want all the pages listed on this letter removed from my Legal Aid file Number B92A03490.*

*I want them removed, not amended."*

- 8 Whilst Mr Doelle's original application for amendment related to some 16 files held by Legal Aid in respect of Mr Doelle, his application for external review was limited to a number of documents held on File No. B92A03490. File No. B92A03490 related to an application made by Mr Doelle for legal aid to institute civil proceedings. At my request, Legal Aid provided me with File No. B92A03490 for inspection. After the file was inspected, a conference was held with Legal Aid to canvass a possible resolution of Mr Doelle's external review outside the ambit of the FOI Act. Legal Aid, in a spirit of co-operation and in a gesture not necessarily required of it by the terms of the FOI Act, agreed to remove documents 38-39, 40-64, 90-94, 96-153, 167-177, 180-190 and 197-208 (hereinafter referred to as the complaint documents) from File No. B92A03490. (Legal Aid maintains that the other documents specified in Mr Doelle's application for review, documents 13 and 28-31, properly belong on File No. B92A03490.) The complaint documents were to be removed from File No. B92A03490 and retained on a separately created file. That file was to be entered into Legal Aid's office computer system and cross-referenced to Mr Doelle's name.
- 9 At a conference on 3 August 1993 and in my letter to him dated 17 August 1993, Mr Doelle was advised of my preliminary view that the proposal which had been agreed to by Legal Aid was an appropriate means of facilitating the removal of the complaint documents from File No. B92A03490.
- 10 In my letter dated 17 August 1993, I also provided Mr Doelle with my preliminary views as to the availability of "removal" (whether by way of destruction or disposal) as a form of amendment under the provisions of Part 4 of the FOI Act. At that time, I afforded Mr Doelle the opportunity to provide me with a written submission:
- (a) detailing how he alleged the documents in issue were inaccurate, incomplete, out-of-date or misleading; and
  - (b) addressing the issue of whether or not removal or destruction of a document was available under the provisions of Part 4.
- I directed that Mr Doelle provide me with his response by no later than 10 September 1993. No response was received from Mr Doelle within that timeframe.
- 11 On 11 October 1993, a telephone conference was held with Mr Doelle to ascertain whether or not he had accepted my preliminary views and whether he intended to make a written submission. During that conversation Mr Doelle rejected the proposal that the complaint documents be removed from File No. B92A03490 and placed on a separately created file. When asked whether or not he wanted to pursue his application for external review through the making of a written submission, Mr Doelle said he did not intend on making a written submission and made it clear he would take no further part in the external review. He was then asked whether or not he was prepared to withdraw his application for external review and Mr Doelle indicated that he would not be so willing.
- 12 By letter 13 October 1993, I provided Mr Doelle with a further 14 days in which to provide me with

any written submissions he wished to make addressing the issues which were raised in my letter dated 17 August 1993. I directed that he provide me with any such submissions no later than 29 October 1993. No written submissions were received from Mr Doelle.

#### **Part 4 - Amendment of Information**

- 13 Part 4 (Amendment of Information) of the FOI Act provides the mechanism by which an individual who has had access to a document containing information relating to his or her personal affairs may, in certain circumstances, request that an agency amend that information in the documents.
- 14 The provision of a right to seek amendment of information which relates to an individual's personal affairs was one of the reasons for the enactment of freedom of information legislation in Queensland. In this regard, s.5(1)(c) of the FOI Act provides as follows:

##### ***"Reasons for enactment of Act***

*5.(1) Parliament recognises that, in a free and democratic society -*

...

- (c) members of the community should have access to information held by government in relation to their personal affairs and should be given the ways to ensure that information of that kind is accurate, complete, up-to-date and not misleading."*

- 15 The right to seek amendment of personal affairs documents is provided in s.53 of the FOI Act, which section reads as follows:

*"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."*

- 16 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.

17 The first and second elements of s.53 have been satisfied in the present case. It must then be considered whether or not the relevant information in the documents in issue is inaccurate, incomplete, out-of-date or misleading for the purposes of s.53 of the FOI Act. Mr Doelle, however, both in his initial application to Legal Aid and his application for review by the Information Commissioner, has not alleged or particularised any aspect in which information in the documents now in issue was inaccurate, incomplete, out-of-date or misleading. His consistent stance has been that particular documents should not be placed on a particular file because they are not relevant to the subject matter of that particular file.

### **The Burden of Proof**

18 Pursuant to s.81 of the FOI Act, Legal Aid has the onus of establishing that its decision was justified. There is nothing on the face of the documents in issue which indicates that the information they contain is in some way inaccurate, incomplete, out-of-date or misleading, and neither in his initial application to Legal Aid nor in his application for review by the Information Commissioner did Mr Doelle particularise any respect in which the information was alleged to be inaccurate, incomplete, out-of-date or misleading. In these circumstances, while on a review under Part 5 of the FOI Act the ultimate legal onus remains on Legal Aid in accordance with s.81, a practical or evidentiary onus shifts to Mr Doelle to provide evidence to support his entitlement to relief under Part 4 of the FOI Act on the basis that the documents in issue contain information that is inaccurate, incomplete, out-of-date or misleading.

### **The Documents in Issue**

19 The documents in issue are held on File B92A03490. That file was created as a result of an application by Mr Doelle to Legal Aid for assistance in instituting civil proceedings. In addition to documents relevant to the processing of Mr Doelle's application for legal aid, the file also contains documents concerning complaints made by Mr Doelle to:

The Queensland Law Society in relation to the handling of Mr Doelle's application by Mr M, a solicitor employed by Legal Aid;

The Parliamentary Commissioner for Administrative Investigations (Ombudsman) in relation to Legal Aid's refusal of the application which was the subject of File No. B92A03490;

Mr Santo Santoro, MLA, about Mr Doelle's application for legal aid which was the subject of File No. B92A03490; and

The Minister for Justice & Attorney-General and Minister for the Arts, the Honourable Dean Wells, MLA, in relation to Mr M and his conduct towards Mr Doelle during the processing of the application which was the subject of File No. B92A03490.

20 The documents in issue fall into two categories:

- (a) the complaint documents, a term which is hereinafter used to refer to documents relating to the complaints identified in paragraph 19 and comprising documents 38-39, 40-64, 90-94, 96-153, 163-177, 180-190 and 197-208; and
- (b) documents 13 and 28-31, being documents relating to the processing of Mr Doelle's application for legal aid.

#### The complaint documents

- 21 As discussed at paragraph 8 above, it was proposed and agreed to by Legal Aid that the complaint documents be removed from File No. B92A03490 by Legal Aid and put on a separately created file which was to be cross referenced with Mr Doelle's name.
- 22 There is nothing on the face of the complaint documents which suggests that the information they contain is in any way inaccurate, incomplete, out-of-date or misleading. Many of the documents consist of letters which were written by Mr Doelle himself or transcripts of conversations which were tape recorded by Mr Doelle. Other documents consist of correspondence received by Mr Doelle and Legal Aid in relation to the complaints made by him to the Queensland Law Society, the Ombudsman, Mr Santoro and the Attorney-General.
- 23 I have considered whether, put at its highest, the real substance of Mr Doelle's objection amounts to this - the presence of the complaint documents on File No. B92A03490 renders those documents (in their entirety) misleading for the purposes of s.53 of the FOI Act, because they are irrelevant to the evaluation of his legal aid application on its merits and their presence may cause discrimination against him by misleading officers of Legal Aid into failing to focus exclusively on the evaluation of the merits of the legal aid application in File No. B92A03490 (and perhaps also any future legal aid applications).
- 24 If so, I do not think such an objection is sustainable in the context of an application under Part 4 of the FOI Act for two reasons. First, an examination of File No. B92A03490 discloses that the complaint documents were specifically concerned with Mr Doelle's application for legal aid which was the subject of File No. B92A03490. In my opinion, it was neither irrelevant, inappropriate or misleading for the complaint documents to have been placed on File No. B92A03490. Second, the focus of s.53 of the FOI Act is on whether information contained in a document is inaccurate, incomplete, out-of-date or misleading and not on whether information in a document which is not itself inaccurate, incomplete, out-of-date or misleading can somehow have misleading consequences if placed inappropriately on a particular file.
- 25 When Mr Doelle was afforded the opportunity (see paragraphs 10 to 12 above) to provide me with submissions in relation to how, if at all, the complaint documents were inaccurate, incomplete, out-of-date or misleading, he declined to do so. In the circumstances, I have no evidence before me on which I could conclude that the complaint documents contain information that is inaccurate, incomplete, out-of-date or misleading for the purposes of s.53 of the FOI Act.
- 26 Accordingly, I have determined that Legal Aid has satisfied its onus under s.81 of the FOI Act in relation to the complaint documents. Further, I commend Legal Aid for its willingness to go outside the terms of the FOI Act in a spirit of co-operation to try to resolve Mr Doelle's apparent concerns, by agreeing to remove the complaint documents from File No. B92A03490 and put them on a separately created file.



Document 13

- 27 Document 13 consists of a computer printout of details of all the files held by Legal Aid in respect of Mr Doelle.
- 28 In the course of inquiries in this matter, Legal Aid advised that in each instance when an application for legal aid is received, a computer inquiry is undertaken to ascertain all other files held by Legal Aid which are relevant to the particular applicant. A computer printout is obtained after undertaking the inquiry. Legal Aid advised that the purpose for undertaking a computer search upon receiving an application for aid was to identify previous files which may be relevant to the application. Computer searches are also undertaken to identify whether or not the applicant had earlier been refused legal aid in respect of the matter which was the subject of the current application. This process is undertaken to ensure against the possibility of multiple applications in respect of the same matter.
- 29 Mr Doelle declined to take the opportunity afforded to him (see paragraphs 10 to 12 above) to provide evidence as to how document 13 was inaccurate, incomplete, out-of-date or misleading for the purposes of s.53 of the FOI Act. There is nothing on the face of document 13 which would lead me to any conclusion other than that it was an accurate record of the files held by Legal Aid in respect of Mr Doelle at the time of his application for legal aid which was the subject of File No. B92A03490. I am satisfied that Legal Aid has discharged its onus under s.81 of the FOI Act and I find that document 13 is not inaccurate, incomplete, out-of-date or misleading.

Document ~~13~~

- 30 Mr Doelle alleged that a document numbered 13 with the number crossed out had, at the time of his inspection of File No. B92A03490, been present on the file. However, at the time I inspected the material file, no document numbered ~~13~~ was located on the file.
- 31 In my letter of 17 August 1993, I requested that Mr Doelle advise whether or not he held a copy of the alleged document and, if so, to provide me with a copy of the document. Further, in the event that he did not hold a copy of the document, I requested that he provide me with a detailed description of the document. Mr Doelle declined to provide me with a copy of the document or any details about the document.
- 32 In the absence of any details as to the nature of this document and how Mr Doelle alleges it to be inaccurate, incomplete, out-of-date or misleading, I am unable to make any finding in favour of Mr Doelle. However, I note that, should such a document have existed at one time on File No. B92A03490, Mr Doelle's request for its removal from the file appears in practical terms to have been satisfied.

Document 28

- 33 Document 28 is a handwritten file note which was created by Mr M, the solicitor in the employ of Legal Aid who had the conduct of File No. B92A03490, during a conference he had with Mr Doelle on 14 May 1992. The conference was convened to discuss the applicant's application for legal aid which was the subject of File No. B92A03490. The file note also contains several notes of telephone conversations Mr M had with third persons arising out of information the applicant provided him at the conference.

34 Document 28 is clearly relevant to File No. B92A03490 as a note of a conference and telephone conversations undertaken in respect of the subject application for legal aid. Mr Doelle declined the opportunity (see paragraphs 10 to 12 above) to provide me with evidence that document 28 was an inaccurate or incomplete record of the conference and telephone conversations which occurred on 14 May 1992 or that it was in some way out-of-date or misleading. There is nothing on the face of document 28 which would suggest that it is in any way inaccurate, incomplete, out-of-date or misleading.

35 I am satisfied that Legal Aid has discharged its onus under s.81 of the FOI Act and I find that document 28 is not inaccurate, incomplete, out-of-date or misleading.

#### Documents 29-31

36 Documents 29-31 consist of a handwritten summary of some of Mr Doelle's files held by Legal Aid. The file summary was created by Mr M after Mr Doelle's application for legal aid, which was the subject of File No. B92A03490, was received by Legal Aid.

37 During the course of my inquiries for this review, Mr M of Legal Aid advised that the purpose for the creation of documents 29-31 was to:

confirm whether or not any earlier application had been made by Mr Doelle in respect of the matter which was the subject of File No. B92A03490; and

to obtain facts, issues and other details relevant to the application as it concerned a series of incidents involving Mr Doelle, some of which were the subject of earlier applications by Mr Doelle for legal aid.

38 Mr Doelle was afforded the opportunity (see paragraphs 10 to 12 above) to provide me with a submission as to how he alleged documents 29-31 were inaccurate, incomplete, out-of-date or misleading for the purposes of s.53 of the FOI Act. Mr Doelle declined to do so.

39 There is nothing on the face of documents 29-31 to suggest that they are otherwise than an accurate summary of several other files held by Legal Aid in respect of Mr Doelle, being Files No. T88A01214, T89A00735 and T89A01056.

40 I am satisfied that Legal Aid has discharged its onus under s.81 of the FOI Act and I find that documents 29-31 are not inaccurate, incomplete, out-of-date or misleading.

#### Conclusion on the Documents in Issue

41 In respect of all documents which Mr Doelle requested be removed from File No. B92A03490, I have decided that it has not been established that any part of the information contained in the documents is inaccurate, incomplete, out-of-date or misleading, so as to entitle Mr Doelle to apply for amendment or correction of the information in accordance with s.53 of the FOI Act.

42 I am satisfied that, given the nature of Mr Doelle's claims, the appropriate course was that adopted by Legal Aid, being the addition of Mr Doelle's application for internal review to the inside cover of File No. B92A03490. Accordingly, I am satisfied in accordance with s.81 of the FOI Act that the decision under review (being the decision of Ms Hayward of Legal Aid made on 19 January 1993)

was justified.

- 43 In view of this determination it is not strictly necessary for me to consider the issue of whether or not "removal", by way of a document either being destroyed or disposed of, is available as a form of amendment under Part 4 of the FOI Act. However, I propose to also consider this issue in case Mr Doelle is minded to take the matter further, and so that my views in relation to this issue are available to assist agencies in determining applications similar to Mr Doelle's.

### **The Destruction or Disposal of Documents under the FOI Act**

#### Legislative Background

- 44 The right to ensure information held by government relating to the personal affairs of an individual is accurate, complete, up-to-date and not misleading was considered by Parliament as going hand in hand with an individual's right to have access to that information. This can be seen in the provisions of s.5(c) of the FOI Act which is quoted at paragraph 14 of this decision.
- 45 The right of an individual to seek amendment of such documents was considered in the Electoral and Administrative Review Commission's Report on Freedom of Information, Serial No. 90/R6, December 1990 (the EARC Report). The issue of the method of amending government records was discussed in some detail at paragraphs 9.23-9.28 of the EARC Report and the remarks are worth noting:

"9.23 *An issue on which opinions have differed is the form the amendment of records could take. The difference of opinion which exists is exemplified by the following submissions.*

9.24 *The [co-ordinated submission of the Queensland Government Departments] (S116) argued that:*

*'With regard to the amendment of personal records, there is concern that public records should not be obliterated. No amendments should be made to personal information but rather a notation should be made covering the respect(s) in which the person claims that the record is incomplete, incorrect, out of date or misleading.'*

9.25 *Similarly, the Australian Society of Archivists Incorporated (S41) urged:*

*'... caution in regard to the inclusion of a right to amend any inaccuracies or deficiencies in personal information. Adequate provision should be included to ensure any such alterations are duly authorised and noted as amendments to the original records.'*

9.26 *Conversely, the Queensland Council for Civil Liberties (S59) submitted:*

*'Where amendment is made either by the government or institution itself or after review, the legislation ought provide that the record be*

completely amended so as to remove any reference to the incorrect information and, after amendment, that the document or documents containing incorrect, out of date or misleading information be destroyed.'

9.27 *The Commission is conscious of the tension which exists between the legitimate concern on the part of individuals to have potentially damaging records deleted or destroyed and the legitimate need of a government agency to have a complete and comprehensible record of its actions.*

9.28 *The Commission considers that, where there is agreement between the agency and the person concerned that a record is incorrect, there should be scope for deletion of the incorrect material from the record. Otherwise, even where amendments are noted on the record, incorrect statements remaining on the record could be quite damaging. There can be no public interest in maintaining incorrect material on government records. This mechanism is provided for in Part IV of the draft Bill."*

46 The result of this discussion was a recommendation by EARC in the following terms:

*"The right to seek the amendment of records, which contain incomplete, incorrect, out of date or misleading information which relates to the personal affairs of an applicant should include the right to have that information deleted or removed from the record where there is agreement between the agency and the person concerned that the record is incorrect."*

47 That recommendation was adopted verbatim by the Parliamentary Committee for Electoral and Administrative Review in its Report on Freedom of Information for Queensland (18 April 1991).

48 The recommendations of EARC and the Parliamentary Committee clearly indicate there may be circumstances in which the deletion of information from a document would be appropriate where an agreement is reached that the information is inaccurate, incomplete, out-of-date or misleading. It was recommended in those circumstances that the information be removed or deleted from the record. It was not suggested that the record itself be destroyed or disposed of. It is also clear that the recommendations of EARC and the Parliamentary Committee did not go so far as to adopt the submissions made by the Queensland Council for Civil Liberties, that favoured the destruction of entire documents.

#### The Preservation and Disposal of Public Records

49 The preservation of documents which constitute public records is an important adjunct to any freedom of information legislation in view of the fact that unless the continued existence of the record is guaranteed, its availability under the FOI Act cannot be assured. Concerns about the destruction of public records which previously occurred in Queensland was raised in the EARC Report at paragraphs 5.35-5.38.

50 Pursuant to s.50 of the *Libraries and Archives Act 1988* (Qld), the Queensland State Archives is charged with the function of promoting the making and preservation of the public records of

Queensland and also the control over their retention and disposal. Section 50 of the *Libraries and Archives Act* provides as follows:

**"50. Queensland State Archives.** *There shall continue to be an office in Queensland to be known as the Queensland State Archives the functions of which are to promote the making and preservation of the public records of Queensland, to exercise control over their retention and disposal, to provide facilities for their storage and use and to provide administration in respect of anything stored by it.*

*The Queensland State Archives is part of the State Library of Queensland."*

51 Section 55 of the *Libraries and Archives Act*, which governs the disposal of public records in Queensland, provides as follows:

**"55. Public records protected.** (1) *A person shall not dispose of public records other than by depositing them with the Queensland State Archives-*

(a) *unless -*

- (i) *the State Archivist has authorised the disposal; or*
- (ii) *notice in writing of his intention to do so has been given by him or on his behalf to the State Archivist and -*

(A) *a period of at least 2 months has elapsed since the giving of the notice; and*

(B) *the State Archivist has not exercised his power under subsection (2) to take possession of the public records or direct that they be deposited with the Queensland State Archives;*

*and*

(b) *unless, in the case of public records to which subsections (4) and (5) apply, the period prescribed therein has expired.*

*A person who disposes of public records in contravention of this section commits an offence against this Act and shall be liable to a penalty not exceeding 100 penalty units."*

52 The existence of this statutory provision suggests that it is highly unlikely that the Queensland Parliament intended that the destruction or disposal of public documents should be available as an option for amendment of documents under Part 4 of the FOI Act (*cf.* the express provision for obtaining approval for destruction of records from the Keeper of Public Records in s.49 of the *Freedom of Information Act 1982* (Vic) (the Victorian FOI Act), discussed at paragraphs 81 to 96 below).

#### Part 4 of the FOI Act

53 Section 53 of the FOI Act provides that in circumstances where the three elements of the section

have been satisfied, an individual is entitled to apply to the agency or Minister in question for the "correction or amendment" of any part of the information that is inaccurate, incomplete, out-of-date or misleading.

54 Section 55 of the FOI Act stipulates the way in which the amendment of information may be undertaken. Section 55 provides as follows:

*"55. If an agency or Minister to whom an application is made under section 53 decides to amend the information to which the application relates, the agency or Minister may make the amendment by -*

*(a) altering the information; or*

*(b) adding an appropriate notation to the information."*

The Oxford English Dictionary defines "altering" as follows:

*"Changing in some respect: a. Making otherwise; b. Becoming otherwise."*

55 The Collins English Dictionary defines "alter" to mean:

*"To make or become different in some respect; change."*

56 The ordinary meaning of "altering" for the purposes of s.55 does not, in my view, include the destruction or disposal of the document containing the information which is being altered, but rather involves changing the information so that it becomes different in some respect. This may involve deletion of the information which is found to be inaccurate, incomplete, out-of-date or misleading but it does not encompass the destruction or disposal of the entire document.

57 Further, it is to be noted that s.55(a) provides that it is the "information" which may be altered rather than the "document" which records the information. This lends support to the conclusion that disposal or destruction of the document in its entirety is not available as a means of amendment pursuant to s.55 of the FOI Act.

58 Section 53 of the FOI Act also refers to the "correction" of any part of the information which is inaccurate, incomplete, out-of-date or misleading.

59 The Oxford English Dictionary defines "correction" as follows:

*"The action of correcting or setting right; substitution of what is right for what is erroneous (a book etc.); amendment."*

60 The Collins English Dictionary defines "correction" to mean:

*"1. The act or process of correcting. 2. Something offered or substituted for an error; an improvement."*

61 The ordinary meaning of "correction" for the purposes of s.53 does not, in my opinion, include the destruction or disposal of the document in which the inaccurate, incomplete, out-of-date or misleading information is recorded but involves the substitution of some different information for

that which has been found to be incorrect. Again, s.53 provides that it is the "information" rather than the "document" which contains the information that is being corrected.

62 It is evident that the terms "correction" and "amendment" as they appear in s.53 of the FOI Act largely overlap, so that in many (if not all) instances where a correction of inaccurate, out-of-date or misleading information is made, such would also amount to an amendment of that information. It may be the case that the insertion of the term "correction" in s.53 of the FOI Act is merely surplusage; I note that the word "correction" does not reappear in s.55 of the FOI Act, where only "amend" and "amendment" are used.

63 I accept that there may be instances (hopefully rare) where the entire body of a document (whether it be a letter, memorandum, report or other document) is so inaccurate, incomplete, out-of-date or misleading as to justify the entire body of the document being amended. Depending on the potential prejudicial effect of the information requiring amendment, it may be appropriate that the entire body of the document be deleted, and the correct information substituted. This would not constitute the destruction or disposal of the complete document as long as the identifying parts of the document (e.g. headings as to subject matter, date, author etc.) remained intact.

### **Case Law on Amendment of Documents in Other Australian Jurisdictions**

#### Commonwealth of Australia

64 In Re *QAI and Secretary to the Department of Social Security* (Unreported, Commonwealth AAT Decision No. Q88/263, 9 August 1989) (the *QAI* case), the applicant made application to the respondent for amendment of a report by a Commonwealth medical officer, Dr Wydell, which was made after he examined the applicant at the request of the respondent in respect of an application by the applicant for an invalid pension under the provisions of the *Social Security Act 1947* (Cth).

65 The applicant originally claimed an invalid pension on the basis of an orthopaedic disability affecting his neck. A medical assessment was undertaken and the pension refused as no significant neck disability was found.

66 After lodging a second pension application, the applicant was examined by Dr Wydell who stated that there was no evidence of an orthopaedic injury but that it was his opinion that the applicant was suffering from "obsessive/delusional psychosis" and that he was permanently disabled. As a result of that assessment, the applicant was granted an invalid pension. However, the applicant believed he was entitled to an invalid pension on the basis of an orthopaedic condition and not an abnormal psychiatric condition. The application for amendment requested that Dr Wydell's report be removed from the respondent's record or, alternatively, altered so as to expunge all references to any psychiatric condition.

67 At the material time, the relevant provisions of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act) provided as follows:

*"48. Where a person (in this Part referred to as the 'claimant') who is an Australian citizen, or whose continued presence in Australia is not subject to any limitation as to time imposed by law, claims that a document of an agency or an official document of a Minister to which access has been lawfully provided to the claimant, whether under this Act or otherwise contains information relating to his personal affairs -*

- (a) that is incomplete, incorrect, out of date or misleading; and*
- (b) that has been used, is being used or is available for use by the agency or Minister for an administrative purpose,*



*he may request the agency or Minister to amend the record of that information kept by the agency or Minister."*

*"50.(1) Where an agency to which or Minister to whom a request is made under section 48 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."*

68 In response to the applicant's request that the medical report be removed from the respondent's files, Deputy President I R Thompson stated (at p.5) that *"Part V of the Act contains no provision for removal from an agency's files of a document containing information that is incomplete, incorrect, out of date or misleading"*. Removal of the medical record from the file was held not to be open to the Commonwealth AAT as a means of "altering the record" for the purposes of s.50(1) of the Commonwealth FOI Act. Deputy President Thompson went on to conclude (at p.8) that the respondent had discharged its onus of proof in that the medical report was not incomplete, incorrect, out-of-date, or misleading and, accordingly, the decision under review was affirmed.

69 In *Wade Ewart Cox and Department of Defence* (Unreported, Commonwealth AAT Decision No. A89/26, 2 February 1990) (*Cox's case*), the applicant sought amendment of a number of documents held on his service medical record under the provisions of Part V of the Commonwealth FOI Act, being several medical and psychological reports. The applicant's claim was for the removal of those documents from his file.

70 In relation to the Commonwealth AAT's power to order the removal of the material documents, Deputy President Todd stated (at p.3):

*"3. The applicant's primary claim is for the removal of certain documents from his files. It is a nice question whether the Tribunal has power to order removal of a document from a record. I know of no case, and was referred to none, in which the Tribunal has understood the power of 'altering the record' (see s.50(1)) to include ordering the removal of a document or documents. The power is to amend the record, not to amend a document. The record may be amended by altering the record or by adding an appropriate notation to the record (s.50(1) and (2)). It is to be noted that the whole process is to be commenced by a request under s.48 to 'amend the record of ... information' where the claim is that 'a document ... to which access has been provided to the claimant under this Act contains information relating to his personal affairs - (a) that is incomplete, incorrect, out of date or misleading; ...' As will appear, I am not of the opinion that any of the documents should be removed even if a power so to direct should be found to exist. I consider that to do so would obscure the history of the matter and would in fact obscure a prima facie case that serious errors occurred in some medical assessments of the applicant nearly 20 years ago, errors flowing, it would be contended, from the formation by those involved of an idee fixe about the applicant's condition."*

71 The applicant in *Cox's case* was with the Australian Army in Vietnam in 1969 when he sustained a severe injury to his forehead, face and to one knee. After returning to Australia, the applicant continued in the employment of the Defence Forces and was troubled by headaches, neck pain, dyspepsia and other symptoms. He was medically and psychologically examined on several occasions and his symptoms were attributed to psychological causes rather than to the injuries he

sustained whilst in Vietnam. The medical problems the applicant experienced eventually led to his retirement from the Defence Forces.

72 Eventually the applicant was diagnosed as having chronic pain and disability from multiple severe joint symptoms, most of which had arisen from trauma-induced degeneration. On the basis of this diagnosis the applicant sought to have much of the information which recorded the earlier diagnoses of his symptoms on his service medical record removed or substantially amended.

73 After hearing considerable evidence on the documents the applicant sought to amend, Deputy President Todd concluded as follows (at p.31):

*"42. After much consideration I have come to the conclusion that, even if I had the power to order the removal of a document from the record I should not do so in this case, having regard to the evidence of Mr Woodger and Ms Higgins. Their evidence was in many respects very supportive indeed of the applicant, but both were of the opinion that if required to give professional advice in such a case they would need to see all reports that had gone before. In my opinion this must surely be so. Even accepting all of the criticisms made by the applicant of some of the reports, they would at the very least remain part of the story of the handling of the applicant's situation, and would in all the circumstances need to be in the hands of anyone called on to give a report on the applicant's medical condition and/or history."*

74 Whilst Deputy President Todd did not order that the documents impugned by the applicant be removed from the records of information in question, he did find that much of the material of concern to the applicant contained information which was misleading, out-of-date, incomplete and incorrect. The result was that substantial annotations and some additions to the material were ordered.

75 The decision of Deputy President Todd in *Cox's* case was followed by the Commonwealth AAT in its decision in *Re Gordon and Department of Social Security* (1991) 25 ALD 327 (*Re Gordon*). In that case, the applicant applied to amend certain medical reports held on the files of the Department of Social Security (the Department). His request was for the reports to be deleted from the Department's file. The applicant had on three occasions lodged an application for an invalid pension with the Department. Each application had been rejected by the Department. The applicant then applied to the Social Security Appeals Tribunal (SSAT) for a review of the decision regarding his claim. The SSAT set aside the Department's decision to refuse his application for an invalid pension. The SSAT indicated that several reports, being the reports the applicant sought to be deleted, were to be afforded little weight and that the report of another medical practitioner was to be preferred over them. On the basis of the SSAT decision the applicant submitted that the discredited reports contained information which was incomplete, incorrect, out-of-date or misleading. The Department had agreed to amend the documents by adding an appropriate notation to the record. However, the applicant wanted the medical reports "deleted" from the Department's files.

76 It fell to be determined by the Commonwealth AAT whether or not deletion was a form of amendment available under the provisions of the Commonwealth FOI Act. In considering the applicant's request, the Commonwealth AAT made reference (at p.341) to a prior decision in *Re Wiseman and Department of Transport* (1984) 12 ALD 707, where the Tribunal said at 709-710:

*"(36) The alteration of a record in a file changes what has become a historical*

*record. It will be remembered that the duty of George Orwell's Winston Smith, as an officer of the Records Department of the Ministry of Truth of Oceania in Nineteen Eighty-Four, was to carry out the 'process of continuous alteration' whereby 'day to day and almost minute by minute the past was brought up-to-date'. Activity as extensive as that described by Orwell cannot have been contemplated by Parliament in the enactment of Pt V. What was written is what was written, and that fact may have its own significance. The Tribunal notes in Re Leverett and Australian Telecommunications Commission (1985) 8 ALN N135 the comment that, in consequence of an amendment pursuant to s.48 which had been made by the respondent prior to the hearing, 'It will be seen that there is a degree of artificiality in the record, in that Mr Bates' report as amended ... contains words which are not those of Mr Bates'. In our view, this kind of artificiality is to be avoided. Further, the wholesale amendment and updating of records of information relating to personal affairs would impose enormous and unthinkable burdens on those whose duty it is to maintain those records. The amendment of government records is a serious matter, which Parliament cannot have intended to be lightly undertaken. The addition of a notation, on the other hand, does not give rise to these difficulties, and may well be, in most cases, the appropriate way of giving effect to the interest of the individual in accuracy of records."*

77 The Commonwealth AAT then quoted the paragraph from the decision of Deputy President Todd in Cox's case which appears above at paragraph 70 and went on to conclude as follows (at p.342):

*"(29) We would, with respect, adopt those passages also. Like Mr Todd, we are not aware of any case where the tribunal has understood the power of 'altering the record' to include ordering removal of a document.*

*(30) If there was evidence before us that any of the remaining seven documents was 'incomplete, incorrect, out-of-date or misleading', we are satisfied, for the reasons given in both Wiseman and Cox, that the appropriate course of action would be for us to order that the amendment of the record be effected by the addition of an appropriate notation, and not by removing or altering the record itself. The respondent has followed that course. In terms of s.61, we are satisfied that the decision given in respect of the request was justified."*

78 The terms of Part V of the Commonwealth FOI Act, as considered in the *QAI* case, *Cox's case* and *Re Gordon*, were in similar terms to the material provisions of Part 4 of the FOI Act. The reasoning applied in each case is consistent with my conclusion that the destruction or removal of documents from public records is not available under the provisions of Part 4 of the FOI Act. In the present case, the fact that each document was created on a particular date would "remain part of the story" of Mr Doelle's dealings with Legal Aid regarding his application for legal aid which was the subject of File No. B92A03490.

79 Subsequent to the decisions of the Commonwealth AAT in the *QAI* case, *Cox's case* and *Re Gordon*, Part V of the Commonwealth FOI Act was amended. Of interest in the present context was the insertion in the Commonwealth FOI Act of s.50(3), which provides as follows:

*"To the extent that it is practicable to do so, the agency or Minister must, when making an amendment under paragraph (2)(a), ensure that the record of information is amended in a way that does not obliterate the text of the record as it*

*existed prior to the amendment."*

80 The amendment of Part V of the Commonwealth FOI Act followed the 1987 "Report on the Operation and Administration of the Freedom of Information Legislation" (the Senate Committee Report) by the Senate Standing Committee on Legal & Constitutional Affairs (the Senate Committee). One of the issues considered by the Senate Committee was the question of whether or not the amendment of public records should be limited to the addition of a notation only. The recommendation of the Senate Committee, which was ultimately adopted in the form of s.50(3) of the Commonwealth FOI Act, was that guidelines should be enacted concerning the amendment of records to provide that:

*"Correction, when decided upon, should be made by a means that does not obliterate the original, unless it can be shown that obliteration would not leave past administrative actions unexplained."* (Senate Committee Report, p.227)

### Victoria

81 The material provisions of the *Freedom of Information Act 1982 (Vic)* (the Victorian FOI Act) in Part 5 - Amendment of Personal Records - provide as follows:

#### ***"Person may request amendment of record***

*39. 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".*

#### ***"How corrections or amendments are made***

*49. 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."*

82 The first decision in Victoria on the availability of expungement as a form of amendment under the provisions of Part 5 of the Victorian FOI Act was that of His Honour Judge Rendit of the County Court of Victoria in *G v Health Commission of Victoria* (Unreported decision, 13 September 1984) (*G's case*).

83 In *G's case*, the applicant, a psychiatric ward nurse employed by the respondent at a mental institution, made application for the expungement of certain material from his personnel file. The material related to an investigation conducted by the police into an allegation that the applicant had engaged in sexual intercourse with an elderly female patient at the hospital. After their investigation, the police reported that they had failed to obtain any evidence of a criminal offence and, accordingly, the allegation of sexual misconduct could not be substantiated. The documents on the applicant's personnel file included the report of the complaint from the psychiatric

superintendent to the respondent, copies of police statements taken from various people, a copy of the applicant's record of interview with the police and a letter from the police department.

84 The applicant asserted that, having regard to the conclusion by the police and his own statement to the police, the documents on his personnel file were inaccurate and gave a misleading impression of his having committed an act of sexual misconduct and should, as a result, be "expunged" from his personnel file. In effect, the applicant was requesting the removal or destruction of the documents in issue.

85 The respondent refused to remove the material as requested and determined that it would be appropriate that a clarificatory note be annexed to the applicant's file.

86 Rendit J found that the material as it stood on the file clearly gave an objective reader the impression that sexual intercourse had taken place. This had not been established and was disputed by the applicant. Accordingly, it was accepted by Rendit J that the material on the file gave a misleading impression and he found that the applicant was entitled to amendment or correction of the material pursuant to Part 5 of the Victorian FOI Act.

87 In considering the applicant's request that the material be "expunged" from his file, His Honour stated (at p.13):

*"I think expungement is inappropriate in disputed fact cases. It is appropriate only in cases where the material is wrong and demonstrably wrong."*

88 Rendit J considered that the placing of a notation on the file would be the appropriate amendment for the circumstances of the case.

89 The comments of Rendit J in *G's* case were cited with approval by Mr Howie of the Victorian Administrative Appeals Tribunal (the Victorian AAT) in *Re Stephens and Victoria Police* (1988) 2 VAR 236 and in the decision of Jones J (President) of the Victorian AAT in *Re Buhagiar and Victoria Police* (1989) 2 VAR 530.

90 In the decisions of both Mr Howie (at page 238) and Jones J (at page 541), it was implicit that both considered the destruction of the document for the purposes of s.49 to fall within the words "expunging the information" in s.49, as both listed the forms of amendment as including:

- (a) alteration;
- (b) notation; or
- (c) deletion or expungement.

91 However, in neither case did Mr Howie nor Jones J consider destruction of the documents in question as a possible remedy.

92 That issue fell squarely for determination in the decision of Mr Galvin, the Deputy President of the Victorian AAT, in *Re Lee and Ministry of Education* (1989) 3 VAR 429 (*Lee's* case).

93 The applicant in *Lee's* case made application for the amendment of her personnel file held by the respondent. In her application, the applicant alleged that the file was misleading and discriminatory and requested that the records be "destroyed" and that the respondent make the necessary arrangements with the Keeper of Public Records to facilitate the destruction of the documents.

94 After quoting the applicant's request for amendment, Mr Galvin stated as follows (at p.431):

*"Section 49 of the FOI Act requires the concurrence of the Keeper of Public Records where a correction or amendment 'has the effect of deleting or expunging the information'. The section in effect acknowledges deletion and expungement (which I take to be forms of destruction) as kinds of correction or amendment. There is nothing in the FOI Act which leads me to the conclusion that destruction ceases to be an acceptable form of correction or amendment merely because it involves all and not only part of the information.*

*In their ordinary usage the terms correction and amendment would appear to contemplate something less than entire destruction. However, in view of the provisions of s.49, I accept that, for purposes of the FOI Act, destruction is a form of correction or amendment albeit an extreme form."*

95 However, Mr Galvin went on to conclude (at p.432) that, on the evidence, the applicant had not established the documents in question were inaccurate, incomplete, out-of-date or would give a misleading impression. Accordingly, whilst acknowledging that destruction of entire documents was open in view of the provisions of s.49 of the Victorian FOI Act, the remedy was not available to the applicant on the evidence.

96 It is evident from the materially different wording of s.49 of the Victorian FOI Act, that the Victorian cases cannot be relied on in Queensland as authority to support the proposition that destruction of documents is available as a form of amendment under the provisions of Part 4 of the Queensland FOI Act. Section 49 of the Victorian FOI Act expressly contemplates the correction or amendment of a document by way of destruction of the document provided the concurrence of the Keeper of Public Records is obtained. This would not affect my opinion that the words of s.55 of the Queensland FOI Act, construed according to their ordinary meaning, do not authorise the destruction or removal of documents.

**Conclusion on the Destruction or Disposal of Documents under the FOI Act**

97 In addition to my finding at paragraph 41 above, I find that the decision under review should also be affirmed on the alternative basis that removal or destruction of the documents in issue, as requested by the applicant, is not a method of amending information which can be required of an agency or Minister under s.55 of the FOI Act.

.....  
F N ALBIETZ  
**INFORMATION COMMISSIONER**