

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: F2004105  
Decision Ref: D0032005**

Participants:

**Lyle Albert Bowden**  
Complainant

- and -

**Department of Housing and Works**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – application for amendment of personal information under Part 3 of the *Freedom of Information Act 1992* – refusal to amend personal information by way of alteration or deletion – whether disputed information is inaccurate, incomplete, out of date or misleading – notation or attachment under s.50.

*Freedom of Information Act 1992 (WA)* ss.45(1); 48(1); 48(3); 50; Schedule 2 Glossary

*Re Leverett and Australian Telecommunications Commission* (1985) 8 ALN N135

*Re Resch and Department of Veterans' Affairs* (1986) ALD 380

*R.R v Department of the Army* 482 F Supp 770 (1980)

## **DECISION**

The decision of the agency not to amend the information is confirmed.

D A WOOKEY  
A/INFORMATION COMMISSIONER

18 March 2005

## REASONS FOR DECISION

### BACKGROUND

1. This complaint arises from a decision of the Department of Housing and Works ('the agency') not to amend information in accordance with an application for amendment made under Part 3 of the *Freedom of Information Act 1992* ('the FOI Act') by Mr Bowden ('the complainant').
2. The complainant was employed by the now-defunct Building Management Authority ('the BMA'). In 1998 the BMA ceased to exist and all its personnel records were forwarded to the agency. In 2002, the complainant lodged a claim for payment of mileage incurred when the complainant was an employee of the BMA between 1990 and 1992.
3. As a result, the A/Manager Human Resources prepared a memorandum dated 2 January 2003 to the A/Executive Director, Business, of the agency providing background information on the complainant and his employment history and various other issues involving the complainant. It was noted in the memorandum that the complainant had not made a claim at the time he claimed the mileage was incurred and had not subsequently pursued the legal avenue that had been available to him for six years following that time, after which date he was out of time to do so. The memorandum included advice as to whether an *ex gratia* payment could be made to the complainant. The memorandum concluded that an *ex gratia* payment was not appropriate.
4. In a letter dated 27 February 2004, the complainant applied to the agency for amendment of personal information about him contained in the memorandum. In particular, the complainant sought amendment of a paragraph of the memorandum, by alteration of two, and deletion of one, of its four sentences, or by deletion of the entire paragraph. The complainant claimed the paragraph was inaccurate and it would be unfair to retain it in the document.
5. In a notice of decision dated 24 March 2004, the agency informed the complainant that it was not satisfied that the paragraph was inaccurate, incomplete, out of date or misleading. Accordingly, the agency refused to amend the information in the manner requested by the complainant in his application for amendment. The agency's decision was confirmed on internal review. On 16 June 2004, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained a copy of the memorandum from the agency, together with the agency's file maintained in respect of the amendment application. I examined those documents and considered the submissions made by the complainant. My office made inquiries with the agency and several other agencies in respect of

this matter. My Investigations Officer also examined a file of the Insurance Commission of Western Australia relating to a workers' compensation claim made to that agency by the complainant.

7. After discussions with my office, the agency agreed to amend part of the memorandum by striking through certain information which was established to be factually incorrect. Consequently, the agency struck out (by ruling a line through) half of one sentence and all of another sentence of the paragraph and released a copy of the amended memorandum to the complainant. As a result of that process, only the information in the last sentence of the paragraph remained in dispute ('the disputed information'). The agency had also previously informed the complainant that it was prepared to place on the memorandum a detailed notation prepared by the complainant specifying his concerns about the content of the memorandum. The complainant has not availed himself of that offer.
8. On 29 September 2004, I informed the parties, in writing, of my preliminary view of this complaint including my reasons. On the information then before me, it was my preliminary view that the complainant had not satisfied me that the disputed information was inaccurate, incomplete, out of date or misleading. It was, therefore, my preliminary view that amendment of the disputed information was not justified.
9. Accordingly, I informed the complainant that the agency's offer to make a note on the memorandum and to attach a detailed notation was, in all the circumstances, most appropriate and I strongly suggested that the complainant agree to the proposal. I provided a suggested notation for the complainant's consideration. The complainant did not agree to the proposal and maintained that he required the removal of the information from the memorandum, and he did not withdraw his complaint.

## **AMENDMENT OF PERSONAL INFORMATION**

10. Part 3 of the FOI Act deals with the right of a person to apply to an agency for the amendment of personal information about the person contained in a document of an agency and prescribes the procedures to be followed by an agency in dealing with an application for amendment. Section 45(1) provides that an individual has the right to apply for such an amendment if the information is inaccurate, incomplete, out of date or misleading. The person seeking the amendment must give details of the matters in relation to which the person believes the information is inaccurate, incomplete, out of date or misleading and the person must give reasons for holding that belief.
11. If an agency decides to amend its records, s.48(1) provides that it may do so by alteration, striking out or deletion, inserting information or inserting a note in relation to the information. However, s.48(3) provides that an agency is not to amend information in a way that obliterates or removes the information, or results in the destruction of a document containing the information, unless the Information Commissioner certifies in writing that it is impracticable to retain

the information or that, in the opinion of the Information Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.

### **The disputed information**

12. The disputed information is a sentence which commences “[h]owever, I am aware of various medical opinions about Mr Bowden’s alleged difficulties with BMA management which basically indicate that ...” and then quotes a sentence from a report on the complainant prepared by a medical practitioner in 1993. Given the sensitive nature of the disputed information, I have not quoted the relevant sentence in full in order to preserve the complainant’s privacy to some degree.

### **Is the disputed information personal information concerning the complainant?**

13. In the Glossary in Schedule 2 to the FOI Act, the term “personal information” is defined to mean:

*“...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead-*

- (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample”.*

14. I have examined the memorandum and I am satisfied that it contains personal information as defined in the FOI Act about the complainant. The memorandum is located on the complainant’s personal file and its contents, in my view, reveal personal information about the complainant including his name, aspects of his employment history, medical information about him and information relating to various disputes involving him and his employer.
15. In particular, the disputed information contains its author’s understanding of the effect of “*various medical opinions about [the complainant’s] alleged difficulties with BMA management ...*” by quoting from one medical opinion. I am satisfied that the disputed information is personal information, as defined, about the complainant and therefore may be the subject of an application for amendment under s.45(1) of the FOI Act.

### **Is the information inaccurate, incomplete, out of date or misleading?**

16. The memorandum is from the A/Executive Director of the agency to the A/Manager of Human Resources of the agency and relates specifically to a claim lodged by the complainant. It contains a brief history of the complainant’s employment record; the facts of the claim lodged by the complainant; records of two telephone conversations between the author of the

memorandum and the complainant relating to the claim; an opinion in respect of an “act of grace” payment to the complainant; and the disputed paragraph summarising the author’s knowledge of the long-running dispute between the complainant and his former employer. As I have said, the disputed information is the last sentence of that paragraph and it states the author’s understanding of the effect of “various medical opinions” about the complainant by quoting from one of those medical opinions.

***The complainant’s submission***

17. In addition to his application for external review - a bound volume of well over 100 pages - the complainant has made two large written submissions to me in relation to this matter. His submissions are very detailed. However, a large part of the information contained in those submissions is not relevant to the matters that I must decide.
18. In brief, the complainant contends that the memorandum contains inaccurate information with respect to the long-running dispute between himself and his former employer and, in particular, the disputed information is inaccurate and misleading because it refers to a falsely-based opinion held by a medical practitioner who dealt with the complainant in the early 1990s.
19. The complainant claims that the medical opinion cited in the memorandum does not take into account the fact that the medical practitioner whose opinion it is was not aware of the full facts surrounding the difficulties experienced by the complainant with his former employer. The complainant also alleges that the opinion was based on wrong information given to the medical practitioner by a former officer of the BMA. The complainant submits that, had the medical practitioner not been given that information, the medical practitioner would not have formed the opinion quoted in the memorandum.
20. The complainant also submits that the disputed information refers to “*various medical opinions*” whereas, he asserts, the A/Manager Human Resources could have been aware of only one opinion in the terms cited. In both his submission of 31 August 2004 and his submission of 18 October 2004 to me, the complainant argued that the reference to “*various medical opinions*” is inaccurate because it does not indicate that there was a divergence of opinion, as the complainant claims there was. I take that to be a submission that the disputed information is incomplete and misleading.
21. The complainant has also referred me to two decisions of the Commonwealth Administrative Appeals Tribunal (‘the Tribunal’): *Re Leverett and Australian Telecommunications Commission* (1985) 8 ALN N135; and *Re Resch and Department of Veterans’ Affairs* (1986) ALD 380; and a decision of the U.S. District Court, District of Columbia, *R.R. v Department of the Army* 482 F Supp 770 (1980) which was discussed by the Tribunal in both *Leverett’s* and *Resch’s* cases. The complainant also submits that the disputed information is prejudicial to him because the agency relied upon it in making its decision to not pay the mileage claim lodged by the complainant.

### ***The agency's submission***

22. The agency, in its notice of decision, did not accept that the disputed information was inaccurate, incomplete, out of date or misleading, as it was based upon the recollections of its author and information available to the author. The agency also submits that the disputed information did not influence the decision by the agency not to pay the mileage claim lodged by the complainant.
23. In its notice of decision on internal review, the agency advised the complainant that it accepted that he was entitled to his opinion that the medical practitioner's opinion was erroneous, but that the agency did not accept that that meant the opinion was wrong, and the author of the memorandum had quoted directly from the relevant medical practitioner's opinion. The agency was not, therefore, persuaded that the disputed information was inaccurate, incomplete, out of date or misleading.
24. In respect of the reference to "various medical opinions", the agency was of the view that, even though the author of the memorandum had chosen to quote from only one of them, there were a number of medical opinions and the reference was not, therefore, inaccurate. In its initial decision, the agency pointed out that the author would have had folios 111-125 of the complainant's personnel file available to her at the time of writing the memorandum, and those folios - which are a copy of the reasons for decision in respect of the complainant's workers' compensation application made to WorkCover in 2001 ('the Reasons') - detail several medical opinions, at least two of which express a similar view to the one quoted in the memorandum.
25. The agency submits that the reference to "various medical opinions" accurately reflects that the author of the memorandum was aware of various medical opinions and the quotation of one of them was an attempt to briefly encapsulate the gist of those three specialised opinions summarised in the reasons for decision. The agency noted that the memorandum was written in a non-medical context for non-medical purposes and suggests that the author may have chosen "*...to quote one of those opinions rather than paraphrase all of them in an effort to be as accurate as possible while maintaining the brevity required by the context of her comment.*" The agency submits that the reference is not inaccurate, incomplete, out of date or misleading.

### ***Consideration***

26. In my view, the disputed information is clearly the understanding of the author of the memorandum based on the author's reading of the material that was available to the author at the time she wrote the memorandum. It accurately quotes from the opinion given by a medical practitioner in a report written in November 1993. There is no evidence before me which establishes the opinion was not the medical practitioner's honestly-held opinion or that it was wrong.

The fact that the complainant disagrees with the opinion does not, of itself, establish that the opinion is inaccurate, incomplete, out of date or misleading.

27. Similarly, there is no evidence before me which establishes that the information given to the medical practitioner by the former officer is wrong. The fact that the complainant alleges that it is wrong is not enough to establish that it is. In any event, I am not persuaded that, had that information not been available to the medical practitioner, he would necessarily have given a different opinion. It is clear from the report of the medical practitioner that the former officer's statement was not the only documentation available to the medical practitioner when he formed his opinion. Further, it is clear from that report that much of the medical practitioner's opinion was based on his assessment of the complainant's own descriptions of certain incidents, when interviewed by the medical practitioner, and, in particular, of the complainant's responses to them.
28. In his submissions to me, the complainant has selectively quoted lines from other medical opinions which do not reflect the medical practitioner's opinion upon which the author of the memorandum has relied. However, I have read the relevant parts of the Reasons, which I understand were also read by the author of the memorandum. Included in the Reasons – as well as a reference to the medical opinion quoted in the memorandum – there are references to a number of other medical opinions about the complainant. Two of those express views consistent with the view quoted in the memorandum (in the second last paragraph of the opinion quoted in paragraph 13 and the opinion referred to in the second sentence of paragraph 14 of the Reasons). One of those is from the complainant's then treating general practitioner.
29. Having considered that material, I am not persuaded that the disputed information is inaccurate or misleading. It is clear to me that the author was aware of various medical opinions concerning the complainant's alleged difficulties with his former employer and those opinions are consistent with the view quoted in the memorandum. As I have said, the fact that the complainant does not agree with that view does not mean that it is wrong and the complainant has provided me with no evidence to establish that those opinions are wrong.
30. I am also not persuaded that the disputed information is incomplete. Two of the other medical opinions to which the complainant has referred me, and from which he has quoted selectively, are in fact those respectively quoted in paragraph 13 and referred to in paragraph 14 of the Reasons. As I have said, those opinions do, in my view, express similar views to those quoted in the memorandum. The other opinion to which the complainant has referred me is not mentioned in the Reasons and there is no evidence before me that the author of the memorandum was aware of it. The only other medical evidence referred to in the Reasons is some notes transcribed by the complainant from the notes of a medical practitioner, the contents of which are not described; two reports of another doctor which are not described as expressing any diagnosis or a contrary (or similar) view to that in the memorandum (paragraphs 16 and 17); a medical certificate dated 25 July 2000 noting a particular diagnosis with nothing to indicate whether that was or was not consistent with the other opinions cited;



and progress medical certificates of 1 August and 3 October 2000. None of those appears to me to evidence “a divergence of opinion”.

31. The cases to which the complainant referred me – all of which were decided in jurisdictions other than Western Australia and are not binding upon me – are of no assistance to the complainant’s case in my view. All of them are distinguishable on their facts and, in any event, in none of them did the applicants succeed in having opinions about themselves amended. In *Leverett* the Tribunal expressed the following view:

*“It is unnecessary to attempt to categorise the bases on which a professional opinion could be found to be “incomplete, incorrect or misleading”. To that of a demonstration of total inadequacy of underlying factual information, there could no doubt be added those of the existence of bias or ill-will, incompetence or lack of balance or necessary experience in a person forming an opinion, or the existence of such a trivial factual substratum as to render the opinion formed dangerous to rely upon and likely to result in error, or where facts have been misapprehended.”*

The Tribunal found that, in that case, none of those bases had been established and the opinion concerned was justified.

32. As indicated above, for the reasons I have given, I consider that in this case it has not been demonstrated that the disputed information is based on a “total inadequacy of underlying factual information”; that there was any bias or ill-will, incompetence or lack of balance or necessary experience in either the author of the memorandum or the medical practitioner; that there was “such a trivial factual substratum as to render the opinion formed dangerous to rely upon”; or that the facts have been misapprehended.
33. In *Resch*’s case, the applicant failed in his endeavour to have a medical diagnosis - the subject of a determination by the Repatriation Commission - amended. In that case, the Tribunal took the view that there was no evidence to establish that the factual premises upon which various doctors’ opinions were based were erroneous or that the opinions were other than the opinions which the doctors genuinely held. The Tribunal found that the evidence went no further than to establish that there was a conflict of medical opinion as to the correct diagnosis and expressed the view that medical opinions are not shown to be incorrect merely by producing medical opinions to the contrary. The Tribunal affirmed the decision of the Department of Veterans’ Affairs to refuse to amend the information.
34. In both those cases, the American case *R.R. v Department of the Army* was referred to only as authority that an expert opinion based solely on discredited facts cannot be allowed to stand. As indicated above, I do not consider that it has been established either that the medical practitioner’s opinion in this case, or the statement by the author of the memorandum, was based solely on discredited facts.

35. In summary, it is my view that the disputed information is not inaccurate, incomplete, out of date or misleading as it is a statement of fact by the author of the memorandum based on her reading of the material that was available to her at the time she wrote the memorandum. It accurately quotes from the opinion given by a doctor in a report he wrote in November 1993. There is no evidence before me which establishes that the opinion was not the doctor's honestly-held opinion or that it was wrong. The fact that the complainant disagrees with the doctor's opinion does not, without more, establish that the opinion is inaccurate, incomplete, out of date or misleading. The author of the memorandum had documentary material available to her at the time which referred to two other medical opinions which expressed essentially similar views, albeit in slightly different terms, and there is no evidence that she had available to her material indicating contrary medical opinions.

### **Finding**

36. For those reasons, I am not persuaded that the disputed information is inaccurate, incomplete, out of date or misleading and therefore I am not persuaded that it should be amended as requested or at all.

### **Obliteration or removal of the information**

37. By way of comment, even if I were so persuaded, on the material available to me, I would not be persuaded that amendment by way of obliterating or removing the information would be justified in this instance. In my view, it is not impracticable to retain the disputed information and the complainant has not persuaded me that the prejudice or disadvantage that the continued existence of the disputed information would cause to him outweighs the public interest in maintaining a complete record of information.
38. I am not persuaded that the continued existence of the information would cause the complainant any prejudice or disadvantage. It appears merely as background in the memorandum concerned. Having considered the contents of the memorandum and other documentation, it does not appear to me that the disputed information formed any part of the basis for the agency's declining his request for an *ex gratia* payment. There is no evidence before me to suggest that the information in that paragraph would be relevant to any deliberations by the agency with respect to any similar future claims made to the agency by the complainant. The memorandum in question is now more than two years old and merely provides a background of the complainant's work history and claims against the agency; a consideration of what the agency's obligations were in respect of the complainant's claim for payment of travel allowances; and a request for advice as to whether any further action was to be taken.

### **Notation**

39. Under s.50 of the FOI Act, if an agency decides not to amend personal information as requested, the person who requested the amendment may write to the agency and ask it to make a notation or attachment to the information. The notation or attachment is to give the details of the matters in relation to

which the person claims the information is inaccurate, incomplete, out of date or misleading. Where the person claims the information is incomplete or out of date, the notation or attachment should set out the information the person considers necessary to complete the information or bring it up to date. Unless it considers the notation or attachment to be defamatory or unduly voluminous, an agency must comply with such a request.

40. The agency has consistently expressed its willingness to attach such a notation to the memorandum and I provided the complainant with a suggested draft, in an endeavour to assist him. That appears to me to be the most appropriate way of dealing with the complainant's concerns and, once again, I strongly recommend that the complainant avail himself of that avenue of redress.

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