VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

GRIFFITHS and VICTORIA POLICE
No. 870150
Decided: 11 December 1987 by Judge Rowlands (President).
Preliminary ruling — whether information relating to work performance of applicant concerned his 'personal affairs'.

The applicant, a police inspector, had obtained access to assessment reports concerning him and applied, pursuant to s.39 of the Act, to amend certain details. Section 39 provides:

> Where a document containing information relating to the personal affairs of a person . . . is released to the person who is the subject of that information . . . 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be entitled to request the correction or amendment of any part of that information where it is inaccurate, incomplete, out of date, or where it would give a misleading impression.

At issue in this case was whether information on an individual's work performance related to his personal affairs. The Tribunal commenced its analysis of the phrase by referring to the Shorter Oxford English Dictionary definition of personal — 'of, pertaining to, concerning or affecting the individual person or self; individual; private; one's own'. It observed that 'It is primarily the "individuality" which creates the personal nature of personal affairs'. In this case the Tribunal was satisfied that the document in question did relate to the individuality of the applicant. In taking this view it declined to follow the Federal Court decision of *Young v Wicks* (1986) 11 ALN N176. The Court in Wicks had held that documents relating to the applicant's work as a professional pilot did not relate to her personal affairs.

Finally, the Tribunal confirmed that information in the nature of opinion could be the subject of a s.39 application. In reaching this view the Tribunal cited with approval the following passage from the United States decision of *R.R. v Department of Army* 48 Fed. Supp. 770 (1980):

> It would defy common sense to suggest that only factually erroneous assertions should be deleted or revised, while opinions based solely on these assertions must remain unaltered in the individual's official file. An agency may not refuse a request to revise or expunge prior professional judgements once all the facts underlying such judgements have been thoroughly discredited. This position is reinforced in the Act's legislative history where there are clear indications that insidious rumours and unreliable subjective opinions as well as simply factual misrepresentations fall within the ambit of the Act's structures.

[P.V.]

CREMMEN and OFFICE OF CORRECTIONS
No. G89/1935
Decided: 24 August 1989 by A.F. Smith (Member).
Documents concerning prison management and applicant's conduct while imprisoned — claims for exemption under ss.31(1)(a), (d), (e) and 35(1)(b).

The applicant, who is presently serving a 14-year sentence following his conviction for a number of serious offences, sought access to several groups of documents relating to prison management procedures and the applicant's conduct while imprisoned.

The first group of documents in dispute were Divisional Routines which set out detailed guidelines for prison officers undertaking duties at the County and Supreme Courts of Victoria. The respondent relied upon ss.31(1)(a) and (d) to refuse access to them. Evidence was led before the Tribunal that the procedures were designed to prevent escapes and to ensure the proper management of prisoners. Although some of the guidelines were quite innocuous (one guideline required the Chief Prison Officer to ensure that officers were neat and tidy) the Tribunal was satisfied that taken as a whole, access to the routines would make it easier for a prisoner to escape from custody. Disclosure would therefore be reasonably likely, within the terms of s.31(1)(a), to prejudice the proper administration of the law, which in this case was the management of prisoners.

Section 31(1)(d) is an exemption rarely relied upon by agencies. It applies where disclosure of a document would be reasonably likely to 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of these methods of procedures'. In view of the assistance the guidelines would have to a prisoner wanting to escape from custody, the Tribunal accepted the respondent's argument that the documents fell within the ambit of this exemption.

Under consideration in the second group of documents was a letter from a firm of solicitors to the Governor of Pentridge Prison which concerned the applicant. The respondent relied upon ss.31(a) and (e) and 35(1)(b) to refuse access to the letter. Having read the letter the Tribunal was not satisfied that s.35(1)(b) applied but upheld the s.31 claim. It ruled that disclosure would, as required by s.31(1)(a), prejudice the proper administration of the law in a particular instance — in this case the ability of prison staff to manage a prisoner. In reaching this view the Tribunal was persuaded by evidence led by the respondent that the applicant's behaviour in prison was poor. His history of violence also provided the basis upon which the Tribunal accepted the s.31(1)(e) claim. It held that disclosure of the letter would endanger the lives of physical safety of persons, in this case clients of the solicitors, who provided confidential information relating to the applicant.

For similar reasons, the remaining documents in the second group, namely correspondence between a Crown Prosecutor and the Director of Prisons, were held to be exempt under ss.31(1)(a) and (e). As the Tribunal saw no basis for exercising its discretion under s.50(4) to release the document in the public interest, the decision of the respondent was affirmed.

[P.V.]

TRELOAR and ROADS CORPORATION
No. G89/1963
Decided: 27 September 1989 by Deputy President M. Rizkalla.
Applicant seeking access to name of informant — exemption claims under ss.31(1)(c) and 35(1)(b).

The Roads Corporation (the Corporation) had received information from a telephone caller who identified himself and indicated that the applicant had polio and could not see well in the evening and as a consequence may have some difficulty in driving properly. It was later discovered by the Corporation that the information supplied was 'malicious and without foundation' and that the review of the applicant's licence should not be pursued. The applicant was informed that she did not need to provide any further medical information. However, not satisfied to let the matter rest, the applicant requested access to the name of the informant. The Corporation refused to provide access to the name, relying upon ss.31(1)(c) and 35(1)(b), provisions which both seek to protect from disclosure information provided in confidence. In refusing access the Corporation argued that it attempted to protect informants as much as possible. Any other course, it claimed, would result in persons being reluctant to supply information. The applicant, on the other hand argued that despite the fact that informants might wish to remain anonymous, innocent members of the public ought be able to 'face the accuser', particularly when they were convinced that the information was supplied for a malicious reason and was incorrect. The Tribunal examined *Richardson and Commissioner for Corporate Affairs 2* VAR 51, a case similar to the present one and in which s.31(1)(c) was relied upon. It cited with approval the following passage:

> The legislation is clearly designed to protect the identify of informers and does not differentiate between the good, the bad or the indifferent. The Freedom of Information legislation relates to the provision of information in a documentary form in the hands of government agencies but is not concerned, as such, with the veracity of information contained in a document except under Par V of the Act which provides for the amendment of inaccurate personal records. If it were established that information in a document was false and that an agency was proceeding as if it were true, then the document might be released pursuant to Section 50(4) in the public interest, as it may be appropriate for an applicant to know the precise nature of the information upon which the agency was erroneously or improperly acting.

The Tribunal in Richardson upheld a claim for exemption under s.31(1)(c) and in the present case the Tribunal saw no reason why it should reach a different conclusion and affirmed the Corporation's decision to refuse access to the informant's name.

[K.R.]

CREMMEN and FRANKSTON HOSPITAL
Decided: 25 October 1989 by R. Howie (Member).
Request for names of hospital staff that treated applicant — claim for exemption under s.33 — whether disclosure unreasonable.

The applicant, who is presently imprisoned, sought access to a range of documents relating to his treatment by medical staff at the respondent hospital. He had alleged that he was the victim of police brutality. The outstanding documents in dispute, which the respondent claimed were exempt under s.33, were staff records showing the names of the nursing, medical and general staff on duty when the applicant was admitted.

Section 33 provides exempt status to a document the disclosure of which would involve the unreasonable disclosure of information relating to the personal affairs of any person. The Tribunal held that the names of the hospital staff that treated the applicant was information relating to their personal affairs and that disclosure would, in the circumstances of the case, be unreasonable. In forming this view the Tribunal was influenced by the likelihood of the staff being harassed and abused by the applicant. Disclosure of their names was therefore refused.

[P.V.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

LIDDELL and DEPARTMENT OF SOCIAL SECURITY
No. Q88/307
Decided: 28 June 1989 by Deputy President S. Forgie.
Request for documents in files of the Department of Social Security — claim for exemption under s.37(1)(b) — Tribunal not satisfied that elements of the exemption established — s.61 — parties permitted to lead further evidence.

The applicant sought access to documents held by the respondent which purported to show that he had received income from certain properties said to have been let by him. The document identified were found in the files relating to the applicant and concerning Unemployment Benefit and Sickness Benefit paid to the applicant, and so on an Overpayment file. By the time of the hearing, some 13 documents were claimed by the respondent to be exempt.

One document was a record of 'a telephone conversation with an anonymous person who provided information to the Department on the applicant's alleged business affairs' (para. 3). The respondent claimed exemption for part of this document under s.37(1)(b); (see note of *Re Bojkovski and Secretary, Department of Social Security* in this issue of the *FoI Review* for the text of this provision). The basis of the claim was that this part 'describes the circumstances in which the informant became aware of the information which he provided to the Department' (para. 6).

The Tribunal said that the first question was whether the information had come from a confidential source. It earlier cited a passage from the judgment of Forster J in *Department of Health v Jephcott* (1985) 62 ALR 421 at p. 425 where his Honour said that the 'mere giving of information without more cannot make the giver a confidential source', and, citing *Luzaich v United States* (1977) 435 F Supp 31 at p. 35, that 'a source is confidential if the information was provided under an express or implied pledge of confidentiality'.

The Tribunal then found that in this case there was 'no evidence presented as to whether this particular informer wished to have his identity kept confidential'. Evidence that the Department regarded all information supplied to it in this way was not sufficient by itself, although it was a matter to be taken into account. The Tribunal had earlier observed, citing s.61 of the Act, that the onus of proof lay on the respondent, but although it found that it was 'not satisfied that the information was given to the Department on a confidential basis', it concluded that '[i]t may be that the respondent can lead further evidence and I propose to give the parties the opportunity to lead further evidence if they wish' (para. 13).

The Tribunal found that information about the applicant's alleged business affairs related to the enforcement or administration of the *Social Security Act*, although in this respect too the affidavit of the respondent's witness was deficient, and the Tribunal had to rely on material in the documents provided to it under s.37 of the *Administrative Appeals Tribunal Act* to come to this conclusion.

The Tribunal was not however satisfied that the disclosure of the part of the document in issue would or could reasonably be expected to disclose the identity if the confidential source, noting that apart from relying on the terms of the document itself, the respondent did not lead evidence or seek to make submissions in private. But again the Tribunal gave the parties the opportunity to lead further evidence if they wished to do so (para. 16).

The remaining 12 documents had been completed by persons for the purpose of making an application to rent certain premises as a residence. They contained a host of information about each individual's personal circumstances, such as their address, marital status, occupation, salary, credit and bank accounts and so forth. The respondent claimed that these documents were exempt under ss. 38 and 41 of the Act.

Section 38 was not considered by the Tribunal. Section 41(1) provides:

> (1) A document is an exempt document if its disclosure under this Act would involv the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

After citing *Re Chandra and Department of Immigration and Ethnic Affairs* (1984) 6 ALN 257; [1985] ADMN 92-027 and (1985) 3 AAR 529, 8 ALD 219, the Tribunal had little difficulty in finding that this information related to the personal affairs of the persons concerned.

The only real issue was whether it would be unreasonable to disclose this information to the applicant. The applicant argued that either he owned the property, in which case he would know who these persons were, or, as he claimed, he did not, in which case he should be able to determine who was making a false allegation that he did own the property.

Although it said that there was 'commonsense' in this line of argument, The Tribunal did not accede to it on the grounds that it was not called on to decide the ownership of the property or of how that matter might affect the applicant's entitlements to benefits under the *Social Security Act* (para. 21). The Tribunal had earlier quoted the test stated in *Re Chandra*, and in obvious reference to this case it held that disclosure would be unreasonable because the persons concerned would not be likely to consent to disclosure, and the information in the documents had a current relevance (para. 22).

Comment

1. The holdings in relation to the first and the third of the s.37(1)(b) issues is less generous to agencies than the approach manifested in other cases, such as *Re Munsie and Department of Social Security* (1983) 5 ALD 189, *Re Sinclair and Secretary, Department of Social Security* (1985) 9 ALN N127, and *Re Bojkovski and Secretary, Department of Social Security* (noted in this issue of the *FoI Review)*.

2. But this generosity is qualified by the allowance given to the respondent to adduce more evidence on the questions in relation to which the Tribunal could not find that the respondent had satisfied the onus of proof under s.61 of the Act. The purpose of s.61 must be to place a legal burden of proof on the agency, and in this context it must be a burden of persuasion (rather than simply a burden of presenting evidence sufficient to raise a prima facie case). As a burden of persuasion it 'refers to the duty of a party to persuade the trier of fact by the end of the case of the truth of certain propositions' (J.D. Heydon, *Evidence cses and Materials* (2nd ed., 1984) p.13). It determines which party will lose on the issue if the trier of the facts is uncertain as to the facts (P.K. Waight and C.R. Williams, *Evidence, Commentary and Materials* (3rd ed., 1990) p. 91, and see at p. 111). The practice of the Tribunal to allow agencies and Ministers a further opportunity to adduce evidence in situations where the Tribunal is not satisfied that they have established an exemption claim might be justified on the basis that 'the end of the case' has not been reached. But this attitude greatly undermines the role of s.61.

[P.B.]

NGUYEN GIANG VU on behalf of NGUYEN GIANG VI and DEPARTMENT OF IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS
No. V88/242

Decided: 29 June 1989 by Mrs R.A. Balmford (Senior Member).

Amendment of personal records — internal review required of a deemed decision to refuse to amend — record of date of birth — manner of effecting amendment.

Solicitors acting for Miss Vi made a request under s.48 of the Act for the amendment of the record of information contained in certain documents of the respondent agency; that is, that 'the record of her birth date wherever appearing in the respondent's file with respect to her be amended to read "30 October 1976" in place of "30 October 1979"' (para. 19).

This request had a complicated history, and at points there was considerable delay in dealing with it. Out of it emerged the question of whether, in a case (such as this) where the agency was deemed to have made a decision to refuse to accede to the request to amend, the applicant was nevertheless required to seek internal review. By reason of what appears to be a drafting oversight, the Tribunal held that the applicant was so required. The Tribunal said that:

> the several amendments to the provisions of Part VI of the *FoI Act* effected by sub-section 51(1) in relation to requests made under section 48 do not appear to extend to removing from section 54 the right to request internal review of a decision deemed to have been made under section 56 on a request under section 48 . . .

> It would appear therefore, that, by virtue of sub-section 55(2), an applicant to the Tribunal for review of a deemed decision on a request under section 48 must apply for internal review of that deemed decision before applying to this Tribunal . . . (paras 13 and 14).

Fortunately for the applicant, the Tribunal was able to construe a letter from the solicitors for the applicant Miss Vi as a request for internal review.

The application to the Tribunal was made by Mr Vu, the father of Miss Vi. It was noted that by s.27 of the *Administrative Appeals Tribunal Act* 1975 an application may be made 'by or on behalf of any person . . . whose interests are affected by the decision'. The Tribunal noted that neither counsel had adverted to this issue, but after citing *Re Hattan and Collector of Customs (New South Wales)* (1977) 1 ALD 67 at pp. 69-70, and noting that the documents had been used by Miss Vi 'as a surrogate birth certificate', the Tribunal held that her interests were affected by the decision under review, and so too were those of her father (para. 23).

The Tribunal then referred to the various documents in question and noted the circumstances under which it had been recorded in them that the date of birth of Miss Vi was 30 October 1979. It also made findings that Mr Vu and Miss Vi were persons 'whose continued presence in Australia is not subject to any limitation as to time imposed by law'; that the information of a person's birth related to that person's personal affairs and to her father's personal affairs; and that the information had been and was available for use by an agency for an administrative purpose.

The substantial issue was whether the information in the document was 'incomplete, incorrect, out of date or misleading'. This led to a consideration of the ways in which a person's age might be established, and of the degree to which the Tribunal should be satisfied that the records of the agency should be altered. Section 61 was noted, although the applicant's counsel requested that the matter not be decided simply on the basis that the respondent had failed to discharge this onus.

The Tribunal then noted the problems of receiving evidence through an interpreter, and considered the written report of a paediatrician. It concluded that it was 'satisfied on the balance of probabilities that the record of information sought to be amended is incorrect, and that Vi's date of birth is 30 October 1976 . . .' (para. 56).

The Tribunal observed that in this circumstance it was 'not formally required by the *FoI Act* to decide to amend [the] record' and that that matter was left to the discretion of the decision-maker, and, on appeal to the Tribunal standing in the shoes of the decision-maker (paras 57 and 60). It had earlier noted the view expressed in *Re Wiseman and Department of Transport* (1984) 12 ALD 707 at p. 710 that it was in general unwise to amend or update a record of information, and that the more appropriate course was to add a notation. It also noted however that this agency had given instructions to its officers to treat with sensitivity requests by refugees to adjust statements of their personal circumstances once they had settled in Australia.

It thus concluded that in this case alteration of the record was desirable, but added that it

> should be effected in such a way that the previous state of the record of information which has been altered remains legible, and the fact that the alteration has been made by order of this Tribunal should appear on the face of each record (para. 60).

[P.B.]

QA1 and DEPARTMENT OF SOCIAL SECURITY
No. Q88/263

Decided: 9 August 1989 by Deputy President I.R. Thompson.

Amendment of personal records — record of opinion of a Commonwealth Medical Officer — bases for the amendment of such opinions — whether a record could be removed.

This was an application under s.48 for the amendment of a record. The document in question was the report of a Commonwealth Medical Officer (CMO), made after an examination of the applicant which had been made in the course of the assessment by the agency of the applicant's entitlement to an Invalid Pension. The report rejected the applicant's claim that he suffered from an orthopaedic condition, and instead recorded the opinion that the applicant was suffering from 'obsessive/delusional psychosis', and was incapacitated from working. Invalid Pension was granted on this latter basis.

The applicant obtained the report after making a request under the *Freedom of Information Act* 1982, and then requested its amendment under s.48 of the Act. The agency attached an annotation to the applicant's file which set out what the applicant alleged was wrong with the record, but was not prepared to remove the report or, alternatively, to alter it so as to expunge all reference to any mental condition. He then appealed to the Tribunal and sought to have it take on of these courses of action.

The text of ss.48 to 51 of the Act is set out in the commentary to *Re Cox and Department of Defence* in this issue of the *FoI Review*.

The Tribunal held that it was legitimate for the CMO to consider the applicant's mental state in a consideration of whether the applicant was entitled to an Invalid Pension (para. 8).

Citing *Re Resch and Department of Veteran's Affairs* (1896) 9 ALD 380, the Tribunal said that 'information' in s.48 extended to statements of opinion. It indicated that an opinion might be incorrect or misleading 'if it is based on factual premises which are erroneous'; if it be 'deliberately intended' that it be incorrect or misleading; or 'if it is expressed by a person who lacks the appropriate qualifications and competence to form a sound opinion in the matter (para. 8). The Tribunal seems also to have accepted that s.48 might apply where the author of the opinion acted maliciously, as was contended by the applicant here (ibid.).

On the facts, the Tribunal found no basis to amend the record. It relied on the opinion of a psychiatrist who had examined the applicant, and quoted long passages from the affidavit tendered by the applicant in support of this application to the Tribunal under s.48. (The Tribunal made an order under s.35 of the *Administrative Appeals Tribunal Act* 1975 that the disclosure of his identity be prohibited.)

Although in the light of its finding this question was not material, the Tribunal said that Part V of the *Freedom of Information Act* 1982 'contains no provision for removal from an agency's files of a document containing information that is incomplete, incorrect, out of date or misleading' (para. 7).

Comment

Compare the Tribunal's comments on when it might be appropriate to alter the record of a professional

opinion to the somewhat broader bases suggested in *Re Cox*.

[P.B.]

BOJKOVSKI and DEPARTMENT OF SOCIAL SECURITY
No. N88/635
Decided: 25 August 1989 by G.R. Taylor (Member).
Request for letters sent anonymously to the Department of Social Security — documents provided in a typed version — claim for exemption in respect of a handwritten version of the documents under s.37(1)(b).

This matter concerned a request for information concerning certain reports on the file of the applicant maintained by the respondent agency. They were described by the Tribunal as 'anonymous reports'. The respondent provided the applicant with copies of the three reports which had been sent to it in handwritten form, but provided them in a typed version. The respondent took this course 'on the ground that the handwriting might assist in enabling the identity of the anonymous informant to be ascertained' (para. 3). The exemption in s.37(1)(b) was claimed. This provides:

> A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to . . . (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law . . .

The applicant claimed that he wished to ascertain whether the letter writer was a certain person who, he claimed, had in recent years harassed him and his family.

The Tribunal adopted the approach to s.37(1)(b) stated by Muirhead J in *McKenzie v Department of Social Security* (1986) 65 ALR 645 at p. 649, and examined three questions.

The first was the letters were a 'confidential source'. The applicant relied on the fact that they were not signed and had not been accompanied by a request that they be treated as confidential. But the Tribunal followed the reasoning employed in *Re Sinclair and Secretary, Department of Social Security* (1985) 9 ALN N127 at N131 to hold that from the fact that the letters did not bear the address of the author and were unsigned 'it can properly be inferred that the author was concerned to maintain his or her anonymity' (para. 5).

The second question was whether the information in the document related to the enforcement or administration of the law, and the Tribunal held that having regard to the duties and functions of the respondent under the *Social Security Act*, this condition was satisfied (para. 5).

So too was the third condition — that the disclosure of the documents in the handwritten form might reasonably be expected to disclose the identity of the anonymous informant.

Comment

1. The last — and critical — holding is not justified, but the matter is perhaps one of common sense.
2. No question was raised about whether the Act permits an agency to provide a handwritten document in a typed form. Section 20(1)(b) allows that access may be given by the provision of a 'copy of the document', and there might be a question whether a typed version of a handwritten document is a 'copy' of it. In a case such as this however, it was hardly in the interests of the applicant to raise this point.

[P.B.]

COX and DEPARTMENT OF DEFENCE
No. A89/26
Decided: 2 February 1990 by Deputy President R.K. Todd.
Amendment of personal records — medical records of opinions of professional medical persons — effect of later such opinions — scope of the power to amend — whether a record could be removed — amendments by addition of documents and the addition of a notation to the records in issue.

The applicant served as an officer of the Australian Army in Vietnam. In November 1969 he underwent what the Tribunal described as a 'life-affecting incident' when he and his comrades came under a gun and grenade attack by the Viet Cong and as a result of which he suffered head injuries. After a period of hospitalisation, he resumed duty in February 1970. He resigned from the Army in 1979, and since that time had (at least to the date of this AAT decision) unsuccessfully sought to obtain an invalidity retirement pension (para. 11).

By this request for the amendment of records under s.48 of the *Freedom of Information Act* 1982, the applicant sought the amendment of certain documents which recorded the assessment of the applicant by various doctors acting on behalf of the Army or of the former Repatriation Department. The material parts of s.48 and the accompanying provisions follow:

> 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 of 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.
>
> 49. (1) A request under section 48 — [shall comply with the formalities set out in paragraphs (a), (b) and (c)].
> (2) A request under section 48 shall give particulars of the matters in respect of which the claimant believes the record of information kept by the agency or Minister is incomplete, incorrect, out of date or misleading and shall specify the amendments that the claimant wishes to be made.
>
> 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 discretion, make the amendment either by altering the record or by adding an appropriate notation to the record.
> (2) Where the agency or Minister amends the record or by adding a notation to the record, the notation shall —
>
> (a) specify the respects in which the information is incomplete, incorrect, out of date or misleading; and
> (b) in a case where the information is claimed to be out of date — set out such information as is required to bring the information up to date.
>
> (3) [deals with time for compliance by the agency or Minister]
> (4) [application of s.23]
> (5) [application of s.26]
>
> 51. (1) [provides for review of requests under section 48, by adaption of ss. 54, 55 and 56].
> Where —
>
> (a) an agency or Minister refuses to amend a record pursuant to a request under section 48;
> (b) the claimant makes an application to the Administrative Appeals Tribunal for a review of the decision; and
> (c) the Tribunal affirms the decision
>
> the claimant may, by notice in writing, require the agency or Minister to add to the record a notation —
>
> (a) specifying the respects in which the information is claimed by him to be incomplete, incorrect, out of date or misleading; and
> (b) in a case where the information is claimed by him to be out of date —

setting out such information as is claimed to be required to bring up to date or complete the information

(3) [formalities of the notice required under s.51(2)]

(4) [obligations of the agency or Minister where a notice is given under s.51(2)]

[**Note:** This is the text of the Act as it now stands. At the time of the decision in *Re Cox*, s.48 required that the document in issue must have been obtained by means of a request under the *Freedom of Information Act*.]

In brief, the documents were:

- a note of 1 September 1970 written by an Army doctor referring the applicant to an Army psychologist;
  two documents of 8 and 9 September 1970, being the reports of that Army psychologist (in respect of which the Tribunal observed (paras 15 and 16) that they included comments which 'could be said to be prejudicially [sc. to the applicant] expressed' and which were (as were comments in other of the documents in issue) 'indicative of an accusatory style');
- a referral by another Army doctor of 16 September 1970;
- a report by a psychologist of 1 October 1970 (in respect of which the Tribunal observed that by reason of its comments that the applicant presented as 'aggressive' and so forth, it — 'reminds one of the French saying "Cet animal est tres mechant; quand on l'attaque il se defend" (This is a very wicked animal; when it is attacked it defends itself)'.
- the typed and handwritten versions of a report of 18 January 1971 by an Army Captain, which report had followed an incident during a training exercise held shortly after the applicant had left hospital in October 1970;
- a record card concerning the applicant made on 14 January 1971 at a Regimental Aid Post;
- a report concerning the applicant made by a psychiatrist on 19 January 1971; and
- a report by an Army doctor of 20 January 1971.

The nub of the applicant's complaint about these records was that they seriously understated the significance — as a contribution to his difficulties while in the Army — of the head injuries suffered in the incident described above.

Over objection from the agency, the applicant led evidence of what had been said about the applicant by (i) other doctors employed in the Armed Services in 1977 and at other times; (ii) by doctors consulted by the applicant in 1987 and 1988; and (iii) by psychologists employed by the Vietnam Veterans; Counselling Service. The Tribunal noted in particular a 1988 report of a doctor from a Canberra hospital, of which it said '[i]t raises a prima facie case that the applicant's problems had not in the past been understood' (para. 36).

The agency's objection was that given the appropriate approach to the amendment of the documents in issue (see below), evidence about what other medical experts might conclude with hindsight about the 1970–1971 opinions concerning the applicant's condition was not relevant. It is worth noting the response of the Tribunal:

> the evidence . . . [was] relevant . . . to the extent that it raised doubts about the opinions expressed in the documents in the contextual and situational environment in which they were from time to time put together. On the footing that while the opinions expressed in 1970 and 1971 should be allowed to stand as the expression of professional opinions then held by their writers, later opinions might nevertheless need to be inserted into the record if they indicate that earlier counterparts might have to be regarded as incomplete, incorrect, out of date or misleading. This would be of particular materiality if, as in this case, the older documents forming part of the record are not only available for use by the agency for administrative purposes but are likely to be used in the determination of rights (para. 5).

The agency argued that the records should not be amended in any way. The nub of the argument was that 'irrespective of whether others agree with the opinions or the way in which they were reached, there was nothing to suggest that they are anything but complete and correct records of the opinions held by the persons who wrote them on the date on which they were written', and nor was there evidence 'of their being anything but bona fide analyses' (para. 4).

To support this view, the agency argued that the words 'incorrect, out of date or misleading' in s.48 'should not . . . be treated as a formula for the application of the determinative provisions contained in s.50' (para. 39). The point of this argument is that the discretion of the Minister or agency under s.50(1) to make an amendment, in any case where there has been a request for an amendment under s.48, is not to be confined 'to the considerations betokened by the words 'incorrect, out of date or misleading' (ibid.). Thus, it would seem that the agency was arguing that even if the records in question were incorrect, etc., the discretion of the agency (and on review the Tribunal acting under s.51) to amend them was not necessarily to be shaped by the nature of the errors. The Tribunal rejected this as a general approach.

> there is a logical train running through ss. 48, 49(2) and 50(2) that brings in the words ['incorrect, out of date or misleading'] as the legal statement of the powers of the agency or Minister (and thus of the Tribunal) at all points of the process (ibid.).

But the Tribunal did accept that:

> what is amended under s.50 is not information but a record of information. Thus incorrect information can be recorded correctly. The record ought not to be amended simply because qua record, the information that it correctly records is incorrect information (para. 40).

It added that 'the power to amend conferred by s.50(1) is specifically discretionary', and it approved that a list of factors proposed by the agency as relevant to the exercise of this discretion 'when considering whether the discretion should be exercised and when considering the form that should be adopted for its exercise should such exercise by decided upon' (para. 41). The factors suggested were:

> 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;
> whether the record serves a continuing purpose;
> whether retention of the record in unamended form may serve an historic purpose;
> whether the record is dated;
> whether amendment is being sought as a de facto means of reviewing another administrative decision;
> the extent to which access to the record is restricted;
> whether creation of the record or any of its contents was induced by malice [; and]
> 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 (para. 38).

The Tribunal also considered whether the discretion under s.50(1) to 'make the amendment . . . by altering the record' included 'ordering the removal of a document or documents' (para. 3). It said that this was 'a nice question', but there was no case in which the Tribunal had held that it had this power. It seemed to doubt that this power existed:

> 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 i 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 [as provided for in that section] para. 3).

In any event, the Tribunal did not think that removal of the record was appropriate in this case. At an early point that Tribunal said 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 fixee* about the applicant's condition (ibid.)

At a later point it was said that those professionals called by the applicant in these proceedings indicated that they could not give an opinion unless they could see all the previous reports. The Tribunal thus said that these reports '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 to give a report on the applicant's medical condition and/or history' (para. 42).

In the light of its own analysis of the records in question, and of the evidence of other professional opinions about the applicant and about the records in question, the Tribunal held that in this case there should be a direction for the making of substantial annotations, and for the addition of certain material (para. 45). The nature of some of these amendments is noted below, but it is of more general significance to note the observation of the Tribunal on the circumstances in which action under s.50(1) might be arranged where the record in question was the expression of a professional opinion.

> I acknowledge the force of [the] submission that an opinion is just that, and that the records were complete and correct records of the opinions held by the person who made them. That however does not detract from the fact that such opinions may be overtaken by events and thus be out of date; that the facts upon which those opinions were based may have been incorrect or incomplete; and that as a result the expression of opinions, however *bona fide* they may have been when they were written may now have to be seen as so flawed as to be misleading for the present resort to them (para. 46).

It is worth noting the main kinds of amendment and additions made to the records in question. Some information was found to be incomplete, out of date of misleading 'because of later medical findings and opinion supporting a prima facie case that the applicant's medical problems have derived from wounds sustained in Vietnam, he having suffered musculo-skeletal injuries and trigeminal nerve damage'. The annotation required by the Tribunal was to this effect, and it was also noted that reference should be made to the Decision and the Reasons for Decision of the Tribunal in this matter, and to copies of certain later medical reports on the AAT's file in relation to this matter (para. 48, concerning Document A). In relation to another document, the Reasons for Decision recorded that '[i]t would be dangerous to make any use of it for any administrative purpose' (ibid. concerning Document E, and see paras 22-26). Another record was incorrect and misleading because it was based on a document purporting to have come into existence on a date subsequent to the creation of the record in question (ibid. concerning Document F). Another was incomplete and misleading because, in part, it has a 'serious internal inconsistency' (ibid. concerning Document H).

The Tribunal did not however accede to the applicant's request that the documents in question 'not be shown to or taken into consideration by any authority or review for any administrative purpose under s.37 of the DFRB Act'. [This refers to the question whether the applicant should be regarded as having been retired on invalidity grounds for the purpose of an invalidity pension.] The Tribunal said that such an order was 'far beyond the bounds of any power held by this Tribunal', but it hoped that its Reasons for Decision might be of assistance in this regard (para. 49).

Comment

1. The question whether an agency, Minister or the Tribunal might alter a record by destruction of the document, or by expunging some part of it, has arisen in a number of cases. The Tribunal here (in para. 3) points to the distinction implicitly drawn between the alteration of the record (which is permitted) and the alteration of the document which contains the record (which is not). The point seems to be that this distinction contemplates that the document cannot be altered by its destruction document, or by expunging some part of it. This approach leaves open some questions; for example, would removing it to some other place or file be permissible?. But these comments underline the great reluctance of the Tribunal to employ the power of alteration in a way which would make it impossible to discern what was the record in the document prior to its alteration.

2. This decision is a more fully considered analysis of when it will be desirable to alter the record of a professional opinion than is usually found in the Tribunal's decisions.

3. It is also a good guide to the factors relevant to the exercise of the discretion to alter in s.50(2).

[P.B.]

RECENT DEVELOPMENTS

SEVENTH ANNUAL REPORT ON THE COMMONWEALTH FoI ACT

The seventh annual report on the Commonwealth *FoI Act* confirms the diminishing use of the legislation to obtain access to government records.

The number of requests has steadily declined from a high of 36,512 in 1986 to 24,679 in the present reporting period. Requests fell 10% from the previous year (27,429) and all indications are that the trend will continue.

The top 10 agencies in 1988–89 were: Veterans Affairs (9213), Social Security (5504), Tax (3655), DILGEA (3454), Telecom (377), Comcare (247), Defence (240), Commissioner for Superannuation (225), Community Services and Health (225) and Trade Marks Office (203). Of these agencies, the Department of Defence was most notable, recording a 84.4% drop in requests from the previous year as a result of the implementation of a new policy granting access to personnel records outside the ambit of the Act.

The report notes that while the vast majority of requests were for personal documents, there were only 100 requests for amendment, representing fewer than 1% of all applications.

Access and refusal rates remained relatively constant. A total of 17,788 requests (76.7%) were granted in full, 4631 (20%) in part and 768 requests (3.3%) were refused. Three agencies — the Trade Marks Office, Patent Office and Australian Electoral Commission granted full or partial access to 100% of requests