PART 7 — AMENDMENT AND ANNOTATION OF PERSONAL RECORDS

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Amendment and annotation of personal records under the FOI Act and Privacy Act 1

Comparison of FOI Act procedures and APP 13 1

Records that may be amended or annotated 3

Applies only to personal information 3

Information incomplete, incorrect, out of date or misleading 4

Amendment of recorded opinions 5

Amendment or annotation contingent on prior access 5

How to apply for amendment or annotation 6

Sending an application and providing a return address 6

Information which must be specified 6

Making amendment decisions 7

The evidence on which a decision should be based 7

Assessing the evidence 8

Requisite weight of evidence 8

Circumstances in which information was first provided 8

Authenticity of documents 9

Government records should reflect the closest approximation of the correct information 10

Consequences of amendment 11

Recording and notifying amendment decisions 12

Notifying the applicant 12

Implementing amendment decisions 13

Amending paper records 13

Amending electronic and other records 14

Making and implementing annotation decisions 14

Other procedural matters 15

Transfer of amendment or annotation applications 15

Mandatory transfer of documents from exempt agencies 15

Transfer of applications involving multiple documents 16

Notification of transfer 16

Time limits 16

Acknowledging receipt 18
Authorised decision making 18
Charges 18
Comments on annotations 18
Reviews and complaints 18

PART 7 – AMENDMENT AND ANNOTATION OF PERSONAL RECORDS

7.1 The FOI Act and the Privacy Act both generally allow individuals to seek access to their personal information and to have that information corrected or annotated. Part V of the FOI Act gives individuals the right to apply to an agency or minister to amend or annotate an incorrect record of their personal information kept by the agency or minister. The Australian Privacy Principles (APPs) in the Privacy Act give individuals the right to request an agency[1] to correct, or associate a statement with, their personal information held by the agency. An agency is also required by the APPs, independently of any request from an individual, to take reasonable steps to ensure that the personal information it holds is correct.

7.2 The amendment and annotation provisions in the FOI Act and Privacy Act coexist but operate independently of one another. Agencies are not required to advise individuals to proceed with an amendment request under the FOI Act rather than the Privacy Act. However, the FOI Act procedures, criteria and review mechanisms differ in important respects from those that apply under the APPs. Those differences are considered below at [7.6]–[7.8].

7.3 Neither the FOI Act nor the Privacy Act prevent an agency from correcting personal information under an informal administrative arrangement, provided the arrangement satisfies the minimum requirements of the Privacy Act.[2] For example, an agency may allow individuals to correct their personal information through an online portal.

Amendment and annotation of personal records under the FOI Act and Privacy Act

7.4 A fundamental principle of information privacy is that individuals are entitled to have access to their own personal information held by agencies, except where the law provides otherwise (APP 12 in the Privacy Act). Agencies must also take reasonable steps to correct personal information to ensure that, having regard to the purpose for which it is held, it is accurate, up-to-date, complete, relevant and not misleading (APP 13 in the Privacy Act). Agencies are expected to take all reasonable steps to ensure compliance. If an agency fails to comply with either APP 12 or APP 13, an individual may complain to the Information Commissioner under the Privacy Act.

7.5 The FOI Act provides a complementary procedure that gives individuals a legally enforceable right of access to documents (under Part III) and the right to request correction or update (Part V) of their personal information in agency records or the official documents of a minister. Part V enables records that are incomplete, incorrect, out of date or misleading to be amended on application by the affected person. An applicant may also ask for the record to be annotated to include a statement explaining their objection to the record of their personal information and the reasons for their objection (s 51).

Comparison of FOI Act procedures and APP 13

7.6 Part V of the FOI Act operates alongside the right to amend or annotate personal

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1 In the Privacy Act 'agency' includes a minister.

2 For more information about APP 13 minimum procedural requirements, see Chapter 13 of the Information Commissioner's APP Guidelines at www.oaic.gov.au.

information in APP 13. There is substantial overlap between the FOI Act and APP 13 procedures, but also some noteworthy differences.

7.7 While APP 13 sets out minimum procedural requirements, these are not as detailed as in the FOI Act. However, in two respects APP 13 goes further than the FOI Act:

- The grounds for correction in APP 13 are that the personal information is 'inaccurate, out-of-date, incomplete, irrelevant or misleading'. The additional ground in APP 13 is that the information is 'irrelevant'. The other wording difference — 'inaccurate' in APP 13, 'incorrect' in the FOI Act — is not substantive.
- If an agency corrects personal information the agency must, if requested by the individual, take reasonable steps under APP 13 to notify that change to any APP entity to which the personal information was previously disclosed unless it is unlawful or impracticable to do so. This requirement applies regardless of whether the correction was made under the Privacy Act or the FOI Act.

7.8 The options available to individuals to challenge a decision under the FOI Act and APP 13 also differ:

- Under the FOI Act, an individual may apply for internal review or IC review of an agency's or minister's decision to refuse to amend or annotate a record in accordance with the person's request. The Information Commissioner may affirm, vary or set aside the agency or minister's decision to amend or annotate a record.
- Under the Privacy Act, an individual may complain to the Information Commissioner about an agency's failure to take reasonable steps to correct personal information (Privacy Act s 36). After investigating, the Commissioner may find that an agency has failed to take reasonable steps to correct personal information or to comply with the minimum procedural requirements under APP 13. The Commissioner may make a determination to that effect, and require, for example, the agency to correct the personal information or to comply with the minimum procedural requirements (Privacy Act s 52).

7.9 It is open to an individual to decide whether to make an application under the FOI Act or to make a request under APP 13. Agencies could ensure, in appropriate cases that people are made aware of both options and the substantive differences. An agency could refer to the FOI Act in the agency's APP Privacy Policy.[3] More detailed information could be provided by an agency in other ways. For instance, a separate document that sets out the procedures for requesting correction of personal information, through an 'Access to information' icon on the agency's website,[4] or on a case-by-case basis as the need arises.

7.10 As explained in Part 3 of these Guidelines, agencies should consider establishing administrative access arrangements that coexist but operate independently of the FOI Act and that provide an easier and less formal means for individuals to make information access requests (including requests to correct personal information).

7.11 The remainder of this Part deals with the amendment and annotation provisions in

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[3] APP 1 requires all APP entities to have a clearly expressed and up-to-date APP Privacy Policy about how it manages personal information.

[4] See the OAIC's Guidance for agency websites: 'Access to information' web page at www.oaic.gov.au.

the FOI Act. For more information about the operation of APP 13, see the APP Guidelines, Chapter 13.

Records that may be amended or annotated

7.12 A request for amendment or annotation of a record of personal information in a document under s 48 must meet all of the following criteria[5]:

- the document must be a document of an agency or an official document of a minister containing personal information about the applicant
- the document must be one to which the applicant has already been lawfully provided access, whether as a result of an access request under the FOI Act or otherwise
- the personal information in the document must be incomplete, incorrect, out of date or misleading
- the personal information has been used, is being used or is available for use by the agency or minister for an administrative purpose.

Applies only to personal information

7.13 The right to request amendment or annotation only extends to the applicant's personal information within the document.[6] For example, a person cannot apply for correction or annotation of a policy document that contains no personal information about them.

7.14 An application for correction or annotation differs from the usual scheme of the FOI Act in that it is concerned with records of personal information about the applicant contained in documents, rather than the documents as such. A request for amendment or annotation extends to any record of personal information about the applicant that the agency or minister holds, if the information is used or is available for use for an administrative purpose (s 48(b)). For example, an applicant may claim that an agency document wrongly records their date of birth. The right to have that personal information about the applicant corrected extends to all active records of the applicant's date of birth that the agency has kept for administrative purposes.

7.15 The personal information must be:

- information (such as date of birth or residential address), or
- an opinion (such as a medical opinion)

about an identified individual, or an individual who is reasonably identifiable (s 4(1) of the FOI

5 See Agency Resource 3 'Processing requests for amendment or annotation of personal records' for further guidance.

6 See *'EG' and Department of Human Services* [2014] AICmr 149 [16]-[20] where the Information Commissioner found that information about the costs borne by the applicant in negotiations and dispute with the Child Support Agency was the applicant's personal information despite the Department's submissions to the contrary. In *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [26]-[28], [30]-[31] Britton SM found that information that could be described as an expression of opinion about the manner in which an officer of the Department handled the FOI applicant's citizenship application was not personal information. Accordingly, the power to amend those records could not be exercised.

Act and s 6(1) of the Privacy Act).

7.16 Part V applies broadly to information that has been used, is being used, or is available for use for an administrative purpose. This includes information that was only used once.

Information incomplete, incorrect, out of date or misleading

The right to request amendment arises only where the applicant's personal information in the record is incomplete, incorrect, out of date or misleading. The request may relate to several different pieces of information in one or more documents, or it may relate to only a single piece of information. A different reason may be claimed for each amendment sought. For example, the applicant may claim that part of the information is incorrect, another part is out of date and therefore the whole record is misleading.

Incorrect

7.17 'Incorrect' has its normal everyday meaning. Personal information is incorrect if it contains an error or defect. An example is inaccurate factual information about a person's name, date of birth, residential address or current or former employment.

7.18 An opinion about an individual given by a third party is not incorrect by reason only that the individual disagrees with that opinion or advice. The opinion may be 'correct' if:

- it is presented as an opinion and not objective fact,
- it correctly records the view held by the third party, and
- is an informed assessment that takes into account competing facts and views.

7.19 Other matters to consider where there is disagreement about the soundness of an opinion are whether the opinion is 'complete', 'up to date' and 'not misleading'.

Incomplete

7.20 Personal information is incomplete if it presents a partial or misleading picture, rather than a true or full picture. For example, a statement that an individual has only two rather than three children will be incomplete if that information is held for the purpose of, and is relevant to, assessing a person's eligibility for a benefit or service.

Misleading

7.21 Information is misleading if it could lead a reader into error or convey a second meaning which is untrue or inaccurate. For example, an applicant may claim that a record of opinion or advice is misleading because it does not contain information about the circumstances surrounding that opinion or recommendation. The applicant may seek to have incorporated in the document information that sets out the context for that opinion or recommendation.

Out of date

7.22 Personal information is out of date if it contains facts, opinions or other pieces of

information that are no longer current.[7] An applicant may request that more recent information be inserted into the record as their circumstances change. For example, an applicant may request amendment of a statement that the applicant lacks a particular qualification or accreditation that they have subsequently obtained.

7.23 Personal information about a past event may have been accurate at the time it was recorded, but have been overtaken by a later development.[8] Whether that information is out of date will depend on the purpose for which it is held. If point in time information from the past is required for the particular purpose, the information will not be out of date for that purpose. In these circumstances, an agency or minister must still ensure that the information is complete and not misleading.

Amendment of recorded opinions

7.24 An agency or minister should be careful where a request for amendment relates to a document containing advice, recommendations or opinions of a third party (including a group). Such records should be amended only if the information is incorrect or incomplete, or if the author was shown to be biased or unqualified to form the opinion or to have acted improperly, or if there is some other clear impropriety in the formation of the opinion. The applicant's disagreement with the opinion is not a sufficient reason to amend the record.[9] This approach is consistent with the limitations on the Information Commissioner's power to direct amendments of records in s 55M of the FOI Act (see Part 10 of these Guidelines). The agency or minister should consider consulting the person who provided the advice, opinion or recommendation before amending it.

Amendment or annotation contingent on prior access

7.25 A person only has a right to seek amendment or annotation under the FOI Act if they have lawfully been provided with access to the document(s) in question (s 48). Lawful access includes access:

- granted under Part III of the FOI Act
- provided under an agency's general discretion to allow access to its documents
- required or permitted under any other law of the Commonwealth.

By contrast, a person does not need to have had access to a record of personal information to seek correction under the Privacy Act (APP 13).

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7 In *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [46]-[49], Britton SM considered the applicant's request to amend a document recording a decision by the Migration Review Tribunal on the basis that this decision did not accord with an FOI decision and was therefore 'out of date'. Britton SM indicated that where a decision-maker reaches a different finding to an earlier decision-maker, this does not render the earlier decision 'out of date' and the issue was not whether the finding by the Migration Review Tribunal was 'correct' but whether the statement correctly recorded the finding by the Migration Review Tribunal.

8 In *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [52]-[56], Britton SM found that it would be open to exercise the power to amend file covers and an internal email that recorded an asserted date of birth that was found to be incorrect. Britton SM did not agree with the Secretary's argument that the information must be read in context and these documents were correct factual records of an historical event or historical data based on information provided at that time.

9 See *Grass and Secretary, Department of Immigration and Border Protection* [2014] AATA 751 [39]-[44] per Britton SM.

How to apply for amendment or annotation

7.26 Sections 49 and 51A provide that an application for amendment or annotation must:

- be in writing
- specify certain information (discussed in more detail below at [7.31]–[7.33])
- provide an Australian address to which a notice can be sent
- be sent by post to the agency's or minister's office address, or be delivered to an officer in the agency or in the minister's office.

7.27 This differs from the Privacy Act (APP 13) which does not require a request for amendment to be in writing.

Sending an application and providing a return address

7.28 The application requirements for amendment or annotation are, in two respects, worded differently to the requirements for FOI access requests under Part III. As to FOI access requests, the FOI Act expressly provides that a request may be sent by electronic communication (s 15(2A)(c)) and that an applicant may provide an electronic address for service of notices (s 15(2)(c)). As to amendment and annotation applications, the FOI Act provides only that an application must be in writing (ss 49(a), 51A(a)) and must specify an Australian address to which a notice may be sent (ss 49(c), 51A(d)).

7.29 An application for an amendment or annotation to personal records under the FOI Act is not invalid because it takes place wholly or in part by means of electronic communication such as email (s 8 of the Electronic Transactions Act (ETA) 1999). The requirement for the application to be in writing can be satisfied by electronic communications such as email. Applicants may consent to receiving information from the OAIC by electronic communications such as email (s 9(1) of the ETA 1999).

7.30 Agencies and ministers should allow for the same electronic communication procedures that apply to access requests under Part III to applications under s 48 for amendment and annotation of personal information (see procedures in ss 49 and 51A). Specifically, an agency or minister should accept an application by email, and should accept an email address for service of notices.

Information which must be specified

7.31 Section 49 provides that a request for amendment should as far as practicable specify:

- the document(s) containing the information requiring amendment
- the relevant information to be amended and whether it is claimed to be incomplete, incorrect, out of date or misleading
- the applicant's reasons for claiming the information is incomplete, incorrect, out of date or misleading
- the amendments being requested.

7.32 Section 51A provides that a request for annotation should:

- specify as far as practicable the document(s) which require(s) annotation
- be accompanied by a statement which specifies:
  - the information that is claimed to be incomplete, incorrect, out of date or misleading and whether it is claimed to be incomplete, incorrect, out of date or misleading
  - the applicant's reasons for so claiming
  - any other information that would make the information complete, correct, up to date or not misleading.

7.33 The express obligation on agencies in s 15(3) to help applicants to make a request that complies with the FOI Act applies only to access requests. There is no corresponding provision applying to requests for amendment or annotation. Nevertheless, it is good administrative practice for agencies to treat those requests in the same way. Adopting an informal approach, for example by discussing matters with applicants by telephone, can help to resolve problems and minimise delay in making a decision.

Making amendment decisions

7.34 When assessing whether the information in the document is incomplete, incorrect, out of date or misleading, a decision maker should consider:

- the nature of the information the applicant seeks to amend
- the evidence on which the decision is to be based, including the circumstances in which the original information was provided
- the consequences of amendment, where relevant.

7.35 An agency should apply its own procedures to satisfy itself of the person's identity before deciding whether to amend the record. Agencies should only seek the minimum amount of personal information required to establish the person's identity.

The evidence on which a decision should be based

7.36 As noted above at [7.31]–[7.32], an applicant must give particulars of the amendments being requested and the reasons for their request (ss 49 and 51A).

7.37 A decision to amend a record must be supported by a finding that the record is incorrect, incomplete, out of date or misleading (s 50). This requires a decision maker to undertake a reasonable investigation and to assess the available evidence. If an applicant does not provide evidence in support of their claim, an agency would be justified in refusing to amend the record. However, before refusing a request, a decision maker should give the applicant an opportunity to provide further evidence to substantiate their claims. For example, if the applicant claims that the information is out of date, the decision maker should ask the applicant for evidence of the current position.

7.38 The material that an applicant needs to provide to support their claim will vary according to each case. If an applicant can produce a document that supports the request, they should do so. An agency should also search its own records or other sources to find any evidence supporting an applicant's claims. The applicant's opinion is not determinative; it is for the agency to be reasonably satisfied that the applicant's claims are correct.

7.39 An agency or minister need not conduct a full, formal investigation into the matters that an applicant claims are incorrect or misleading. An investigation is required that is adequate to enable the agency or minister to be reasonably satisfied that an applicant's claims are either correct or incorrect, justified or not justified.

7.40 Agencies should give applicants reasonable assistance if it seems that an applicant has not pursued all likely avenues for obtaining evidence. This may require the agency to notify the applicant of the supporting material it requires and where this information may be obtained. Furthermore, applicants should be given a reasonable opportunity to comment on any adverse inferences drawn when the authenticity or relevance of the material they provide is assessed.

Assessing the evidence

7.41 When processing an application to amend personal information, it is the responsibility of an agency or minister to be reasonably satisfied that a current record of personal information is either not correct or should not be amended.[10]

7.42 The weight of evidence required to satisfy the agency or minister that the current record of personal information is incorrect depends on the significance of the amendment. On a more practical level, the evidentiary weight to be given to documents is assessed based on the circumstances in which the information was first provided and the determined authenticity of the documents.

Requisite weight of evidence

7.43 Generally, the more significant the effect of the amendment sought, the greater the weight of evidence that would be required to justify the amendment.[11]

7.44 In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112, the applicant sought an amendment to his date of birth of just under two years and in *'CT' and Department of Immigration and Border Protection* [2014] AICmr 94 the applicant sought an amendment of 2 years to his date of birth. The lesser weight of evidence required to justify the amendment in these cases reflects that these amendments are relatively minor.[12]

7.45 If the amendment sought is not significant, the weight of the evidence required to justify the amendment would be less than for a more significant amendment. Accordingly, this would make it more difficult for the agency to discharge its onus of establishing that its decision to refuse the amendment is justified, or the Commissioner should give a decision adverse to the applicant (s 55D).

Circumstances in which information was first provided

7.46 In assessing what weight to give to evidentiary documents, the decision maker

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[10] See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20.

[11] See *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [30], '*M' and Department of Immigration and Citizenship* [2012] AICmr 23 [8].

[12] *'CT' and Department of Immigration and Border Protection* [2014] AICmr 94 [41], *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [30].

should consider the circumstances in which the information was first provided.[13] This is particularly important where the applicant has no documents to support their application for amendment other than a statutory declaration stating their case. For example, incorrect information may have been placed in a record because the applicant or others (such as parents or relatives) misunderstood the questions they were asked, or made an error in supplying the information.[14] Alternatively, the person collecting the information may have made a mistake, such as an error in translation, miscalculation of a date of birth or misspelling of a name.

7.47 In such cases, an amendment may be appropriate even if the alternative information is not supported by reliable documentation. This is because the information that is being amended is no more reliable than the information that replaces it.[15] However, an agency must first make a finding as to the correctness of the information it has on record. The threshold question is not which piece of information is more reliable but whether the currently recorded information is incorrect.[16]

Authenticity of documents

7.48 It can be difficult to establish the authenticity of documents provided in support of an application for an amendment. While it may be unrealistic to insist on presentation of originals, an agency may give less weight to a copy, particularly where the authenticity of the original document is in question.[17] Factors an agency or minister may wish to consider when weighing evidentiary documents include:

- whether a copy of a document has been certified and the identity and reliability of the certifier[18]
- whether a document is based on information reported by the applicant (self-reported information)[19]

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13 For example, in *'CI' and Department of Immigration and Border Protection* [2014] AICmr 79 [50]-[56] and [72,] the Information Commissioner took into account the fact that while the applicant had initially reported the recorded date of birth, this was during the resettlement process and found that it was not improbable that a person would be unwilling to correct it until after the resettlement process was complete in order to avoid any delays. The Information Commissioner took this approach again in *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [79] and stated that he had previously accepted that individuals may be reluctant to amend records of personal information during the resettlement process for fear of delaying the process.

14 In *'FD' and Department of Immigration and Border Protection* [2015] AICmr 22 [43], the Information Commissioner accepted the applicant's explanation that he did not know his date of birth and chose the recorded year of birth because he was told he looked young. Nonetheless, in that matter the Information Commissioner found that the Department's record of the applicant's year of birth was not incorrect. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [57], the Information Commissioner accepted as plausible the applicant's explanation that the Department's record was incorrect because the relatives who prepared his migration application may have estimated his date of birth in the absence of documentary evidence or information from his parents at that time.

15 See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [41].

16 See *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [86] – [88]; *'N' and Department of Immigration and Citizenship* [2012] AICmr 26 [21].

17 See *'O' and Department of Immigration and Citizenship* [2012] AICmr 27 [16].

18 See *'T' and Department of Immigration and Citizenship* [2012] AICmr 35 [13], *'IE' and Department of Immigration and Border Protection* [2016] AICmr 12 [22].

19 See *'AU' and Department of Immigration and Border Protection* [2013] AICmr 90 [14], [22], *'CU' and*

- where there appears to be little or no basis upon which the information could have been recorded accurately at the time the document was created[20]
- the reliability of other documents issued by the same agency, organisation or individual[21]
- the quality of a translation of an original document and whether the translator is known or reputable[22]
- damage to the document and/or an indication of tampering with the document[23]
- previous statutory declarations that agree with or contradict a later statutory declaration by the same individual.[24]

7.49 How far an agency goes to check a document's authenticity depends on how relevant it is to establishing the applicant's claims. Where a document is crucial and its authenticity is in doubt, the decision maker should seek the help of their agency fraud prevention services if available. If doubt remains about a document's authenticity, it may be preferable to annotate rather than amend the record.

Government records should reflect the closest approximation of the correct information

7.50 It is important that government records are as accurate as possible. Incorrect information recorded by an agency can have significant adverse consequences for individuals, including in relation to their eligibility for services or benefits.[25] An agency may be satisfied that a record of personal information is incorrect, but find it difficult to establish what the correct information is with certainty. In these circumstances, the agency should record the closest possible approximation of the correct information.[26] When an agency receives an application for amendment of personal records, it is not necessary that the agency be satisfied that the new information proposed by the applicant is correct before it can amend its record under s 50.[27] If the agency makes a finding that the existing

Department of Immigration and Border Protection [2014] AICmr 95 [51], *'CY' and Department of Immigration and Border Protection* [2014] AICmr 101 [45]-[50] and *'FD' and Department of Immigration and Border Protection* [2015] AICmr 22 [26] and [28].

20 In *'CT' and Department of Immigration and Border Protection* [2014] AICmr 94 [31], the Information Commissioner found that little weight could be given to a letter from the Office of the Surgeon General that certified the date of birth of an applicant in circumstances where the applicant had submitted that the original birth documents were either destroyed or unavailable and it was not clear on what basis the hospital was able to provide this information. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr [39], the Information Commissioner gave little weight to a church-issued birth certificate as evidence of the applicant's date of birth in circumstances where the document had not been issued by an official government authority and may have been issued on the basis of recent self-reported information.

21 See *'U' and Department of Immigration and Citizenship* [2012] AICmr 36 [12].

22 See *'A' and Department of Immigration and Citizenship* [2013] AICmr 7 [22].

23 See *'AU' and Department of Immigration and Border Protection* [2013] AICmr 90 [16], *'FD' and Department of Immigration and Border Protection* [2015] AICmr 22 [27]-[28].

24 See *'P' and Department of Immigration and Citizenship* [2012] AICmr 29 [11].

25 An agency should also be mindful of its obligation under the Privacy Act to take reasonable steps to ensure the quality of the personal information it collects, uses or discloses, independent of any amendment request from an individual.

26 See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [39].

27 See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [39]. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [23] – [25], the Information Commissioner explained

information in the record is incorrect, it should amend the record in accordance with the applicant's request if:

- the amendment proposed by the applicant is more likely to be correct than the information currently recorded, and
- there is no other amendment that is more likely to be correct.[28]

7.51 It is open to an agency or minister to amend a record, under s 50, in a way that is different to the amendment proposed by the applicant, provided it is more likely to be correct than any other amendment option. For example, an agency may determine that an applicant's recorded date of birth is incorrect but be unable to determine with certainty that the new date proposed by the applicant is correct.[29] In this case, the agency should record the closest possible approximation of the correct date, whether this is the date proposed by the applicant, or another date that the agency believes, on reasonable grounds, is closer to the correct date. If the exact date of a person's birth cannot be established with certainty, a key consideration should be consistency of dates across the records held by multiple government agencies.[30]

Consequences of amendment

7.52 Once it is determined that a record of personal information is incorrect and there is information that is more likely to be correct, the decision maker should take into consideration the consequences of the amendment being made and the amendment not being made.[31]

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that in the IC review the onus is on the Department to demonstrate that the date of birth it has recorded is not incorrect or that it should not be amended. Where the Department is unable to establish, on the balance of probabilities, that the recorded date is 'correct', then the Department bears the onus of establishing that the incorrect date in its records should not be amended. The Information Commissioner disagreed with the approach taken by the AAT in *HFNB; Secretary, Department of Immigration and Border Protection (Freedom of information)* [2017] AATA 870. In that case the Member, Dr Gordon Hughes, found that the date of birth recorded was incorrect but that the proposed date of birth was not 'correct'. His view was that there is no power under the FOI Act to amend records of personal information to make information 'closer to correct' or 'more likely to be correct' ([30] – [34]). However in *'NA'* the Information Commissioner considered that the approach in *HFNB* shifts the burden of onus from the agency to the applicant in the external review processes, and this is inconsistent with ss 55D(1) and 61(1) of the FOI Act ([24]).

28 See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [39].

29 See for instance *'JP' and Department of Immigration and Border Protection* [2016] AICmr 65 [47]-[49], where the Information Commissioner found that there was little reliable evidence to support either date of birth, but given the consistency with which the applicant had reported the date of birth he was seeking, the Information Commissioner found that that was more likely to be closer to the correct date of birth than the date on record. This decision was set aside by the AAT in *HFNB; Secretary, Department of Immigration and Border Protection (Freedom of information)* [2017] AATA 870. However, the Information Commissioner respectfully maintains that this approach, originally explained in *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 and adopted in *'JP'* and *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 is consistent with the operation of s 50.

30 See *'AM' and Department of Immigration and Border Protection* [2013] AICmr 73 [21].

31 See *'IE' and Department of Immigration and Border Protection* [2016] AICmr 12 [41]-[42]. In *'IE' and Department of Immigration and Border Protection* [2016] AICmr 12, the applicant applied for his date of birth to be amended. The Department recorded the applicant's date of birth as 16 years of age at the time. On the basis of the applicant's contended date of birth, the applicant was 13 years of age at the time. The Information Commissioner took into account the applicant's mother's submissions that the applicant

7.53 However, the fact that an amendment of a record may benefit an applicant, and provide an incentive to make an amendment application, is generally not evidence for or against the correctness of the personal information in a record.[32]

7.54 Sometimes an amendment to a record could have other unintended legal consequences. For example, if an applicant has previously provided incorrect information in a visa application and the information is amended, the visa may be liable to cancellation under the *Migration Act 1958*. If the agency or minister is aware of such possibilities, they should draw them to the applicant's attention. An agency or minister should also make the applicant aware that the amended information will be used in their future dealings. However, in giving such advice, the agency or minister should be careful to avoid appearing to dissuade an applicant from exercising their right to seek amendment. At the same time, an agency or minister is not obliged to represent the applicant's interests. The object is to ensure as far as possible that an applicant can make an informed decision.

Recording and notifying amendment decisions

7.55 An agency or minister who is satisfied the information is incomplete, incorrect, out of date or misleading and that the information has been used, is being used or is available for use for an administrative purpose justified may decide to amend the record as requested (see [7.61]–[7.71] below). It is good practice to note on the relevant file, database or other appropriate place why the decision was made to amend the information, so that the reasons are clear to those who later use the information.

Notifying the applicant

7.56 Where an agency or minister has made a decision, they must give the applicant written notice of the decision (s 51D).[33] The notification should set out:

- the evidence (for and against the request) that the decision maker has examined
- the weighting given to the evidence

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would be eligible to drive a car at the age of 13. The Commissioner considered that the applicant would also not be subject to legal age restrictions on obtaining access to alcohol, cigarettes and financial services if his date of birth was not amended. The Commissioner stated that 'Conversely, the negative consequences of making the amendment appear less significant. While potentially the applicant might remain a minor beyond his 'true' age of majority, and this may or may not unfairly entitle the family to some limited extra Government assistance, it appears the key concern is that a child is properly assessed for age and skills appropriate schooling'. In addition, the amendment to the applicant's date of birth would ensure that the applicant's birth certificate and the records held by various institutions including government agencies were consistent. The Commissioner took into account the challenges that the applicant could face in obtaining further identification documents if his date of birth was not consistent across existing records. In *'NA' and Department of Immigration and Border Protection* [2017] AICmr 112 [85], the applicant applied for his date of birth to be amended. On the basis of the Department's recorded date of birth, the applicant was 19 years old at the time of the IC review decision. On the basis of his contended date of birth, the applicant was 17 years old. The Information Commissioner accepted the applicant's father's submissions that the difference between 17 years old and 19 years old may have an impact on whether the applicant is treated as a child or an adult, and may affect his educational and vocational opportunities.

[32] See *'A' and Department of Immigration and Citizenship* [2013] AICmr 7 [26].

[33] For further guidance on notifying a decision, see Part 3 of these Guidelines.

- the reasons for refusal
- information about the applicant's review rights, and
- information about the right to complain to the Information Commissioner about how the request was handled (s 26 as applied by s 51D(3)).

7.57 The agency or minister has the onus of justifying the decision on review by the Information Commissioner (s 55D(1)). The agency or minister need not prove the information was correct, but must establish that the Commissioner should affirm the decision or give a decision that is adverse to the applicant.

Implementing amendment decisions

7.58 The FOI Act does not specify how records are to be amended. Each agency can therefore adopt the procedure best suited to its record keeping practices.

7.59 Where an agency or minister decides to amend a record in response to a request, all relevant active records must be amended in whatever form those records are kept. It may be that only a central record, such as a database containing client details, need be amended rather than all related records. The records may be amended by correcting or updating them or by adding new information to make the record complete.

7.60 Care must be taken, however, to preserve the integrity of the record. Agencies and ministers should remember that the information being amended still has value as an historical record, and therefore should be retained as far as possible. Section 50(3) requires an agency or minister when making an amendment to ensure, as far as practicable, that the amendment does not obliterate the text of the record, as it originally existed. Removing or destroying part of a record would prejudice the record's integrity as an account of the information originally supplied. Such a record may still be necessary to explain an action taken on the basis of the original information. If this is not possible, the agency should keep a careful account of any changes made, cross-referencing to the file or database that contains the record of the amendment decision.

Amending paper records

7.61 Information on a paper document could be corrected by:

- ruling through the incorrect information
- writing the correct information next to, above or below the incorrect information
- inclusion of explanatory words such as: 'Amended on (insert date) under s 50 of the FOI Act'
- inclusion of cross-references to the amendment by adding the words 'see folio (x) of file (x)', and
- pre-printed stickers with the appropriate wording if there are a large number of amendments.

7.62 Additional or updated information can be recorded in a similar way with the words: 'Additional information provided under s 48 of the FOI Act on [insert date]' or 'updated under the FOI Act on [insert date]'. The date of amendment must always be recorded. The notation could refer to s 51 (where a prior application for amendment was unsuccessful) or

s 51B (where an application for annotation is made under s 48 without first seeking amendment).

7.63 A note that merely states the applicant's views without making a finding on the accuracy of the information the agency or minister holds is insufficient to constitute an amendment for the purposes of the FOI Act (see [7.37] above).

7.64 Where information cannot be amended on the document or in the database, the folio(s) or record(s) which contains this information should clearly cross-reference to the relevant file containing the correct information.

Amending electronic and other records

7.65 Non-paper records (for example, computer data and microfilm) should be amended where possible. As with paper records, where information cannot be altered on the document or in the database, the folio(s) or record(s) which contain this information should be clearly cross-referenced to the relevant place where the correct information is held.

7.66 Although information should be amended in a way that does not obliterate the original text of the record (see [7.60] above), this may not always be possible with electronic records. Agencies should consult their systems administrators or record managers for guidance on amending or annotating electronic records.

Making and implementing annotation decisions

7.67 A person can apply at any time for an annotation to a record. They do not have to apply for an amendment to the record first (s 48(d)).

7.68 Where an agency or minister has declined to amend a record either wholly or partly in accordance with a request, the applicant must be given an opportunity to submit a statement seeking annotation of the record that they claim is incorrect, incomplete, out of date or misleading (s 51(1)). Section 51A (discussed at [7.32] above) sets out the matters that an applicant needs to include in their submission.

7.69 The general rule is that an agency or minister must annotate a record as requested, as annotation, unlike amendment, is not discretionary. However, agencies or ministers are not obliged to annotate a record if they consider the applicant's statement is irrelevant, defamatory or unnecessarily voluminous (s 51(2)).

7.70 Whether a statement is unnecessarily voluminous will depend on the circumstances. For example, a longer statement may be appropriate in some instances, such as where there is a large volume of personal information that the agency has refused to correct. Where it is not reasonable for the agency to add an extensive statement to the personal information, the agency should give the applicant an opportunity to revise the statement. If it is not otherwise practicable to add an extensive statement to the personal information or create a link to the statement, a note could be included on, or attached to, the information referring to the statement and where it can be found.

7.71 Annotation is effected by adding the applicant's statement to the record, cross-indexed to the material claimed to be incorrect, incomplete, out of date or misleading. It does not entail changing the record itself. The statement should be added to all records

containing the information claimed by the applicant to be incorrect.

7.72 Agencies are encouraged to ensure that the existence of an annotation is clearly displayed on the cover of the applicant's active paper files and flagged against all relevant electronic files such as through a central customer database. This will assist future users of the records by drawing their attention to the information the applicant has supplied.

Other procedural matters

Transfer of amendment or annotation applications

7.73 An agency or minister may transfer an amendment or annotation application to another agency or minister who holds the documents requiring amendment or annotation or where the relevant documents contain subject matter which is more closely related to the other agency's or minister's functions (s 51C(1)).

7.74 The receiving agency or minister must agree to accept the transfer before it can take place — and, as a general rule, can be expected to agree to a transfer, unless there are exceptional circumstances. For further information on transfers see Part 3 of these Guidelines.

Mandatory transfer of documents from exempt agencies

7.75 Certain requests for amendment or annotation of personal information must be transferred as follows.

Table 1: Transfer requirements for documents originating with or received from an agency listed in Schedule 2

Document originated with…	and the document is more closely connected with…	the document must be transferred to…
an exempt agency listed in Division 1, Part I, Schedule 2 (eg, Auditor-General, Australian Secret Intelligence Service)	the functions of the exempt agency	the responsible portfolio department (s 51C(2)(c)).
an exempt agency that is a part of the Department of Defence listed in Division 2, Part I, Schedule 2 (eg, Australian Signals Directorate)	the functions of the exempt agency	the Department of Defence (s 51C(2)(d)).

an agency exempt in respect of particular documents, as listed in Part II or Part III of Schedule 2 (eg, documents in respect of commercial activities)	documents in respect of which the listed agency is exempt	the agency (s 51C(3)).

7.76 Because transfers to Schedule 2 agencies are mandatory, agencies and ministers should carefully examine the documents connected with an application for amendment or annotation early in the assessment process to ensure that they do not overlook any documents requiring transfer. For detailed advice about exempt and partly exempt agencies, see Part 2 of these Guidelines.

Transfer of applications involving multiple documents

7.77 Where a person applies for amendment or annotation of personal information held in multiple documents, a transfer provision may apply to one or more of the documents. In that case, the agency or minister can treat the application as though the person had applied separately to amend or annotate each document to which a transfer provision applies (s 51C(4)).

Notification of transfer

7.78 An agency or minister who transfers a request must advise the applicant (s 51C(5)(a)). The transferred request is treated as having been made to the receiving agency or minister (s 51C(6)). Transferring a request does not extend the processing period, which remains at 30 days from the date the application was first received by an agency or minister (s 51C(6)(b)).

7.79 An agency or minister who accepts a transfer of a request and decides to amend or annotate a record must notify the transferring agency or minister of the decision and the amendments or annotations made (s 51C(7)). The transferring agency or minister receiving such a notice must in turn amend or annotate in the same way any documents that they hold that contain the record of personal information to which the application relates (s 51C(8)).

Time limits

7.80 A decision must be made and notified as soon as practicable but not later than 30 days from the day after the request for amendment or annotation was received (s 51D(1)). Failure to comply with the time limit will result in a deemed refusal (s 51DA(2)). A deemed refusal is reviewable by the Information Commissioner (s 54L).

7.81 The provisions in Part III of the FOI Act for extending the processing period for access requests do not apply to requests for amendment or annotation. However, an agency or minister may apply to the Information Commissioner in writing for an extension of the processing period after the initial period has expired (s 51DA(3)). An agency or minister can also seek the applicant's informal agreement to an extension of time. If the applicant agrees to an extension the agreement will not be binding (unlike

an agreement with an applicant on an access request under s 15AA). The applicant is entitled to treat the agency's failure to decide within the 30 days as a deemed refusal under ss 51DA(1)–(2) and to apply for review by the Commissioner (see Part 10 of these Guidelines). However, the applicant's prior agreement is a factor that the Commissioner would take into account in deciding whether to give the agency an extension of time under s 51DA(3).

7.82 An agency should not normally seek an applicant's agreement to an extension of time longer than 30 days. If the agency believes a longer extension will be needed, it would be more appropriate to apply for an extension under s 51DA(3). The Commissioner may grant a period of extension that the Commissioner considers appropriate (s 51DA(4)). The Commissioner may also impose any conditions the Commissioner considers appropriate (s 51DA(5)). If the agency or minister fails to make a decision within the extended period or to comply with a condition, the decision is treated as a deemed refusal at the end of the extended period (s 51DA(7)).

7.83 All references to 'days' in Part V of the FOI Act are to calendar days, not business (working) days. The processing time starts from the day after the agency or minister receives the request. The following table sets out the time of receipt.

Table 2: Time of receipt of the application by the agency based on mode of delivery

Mode of delivery	Time of receipt (processing period commences on following day)
Pre-paid post to a specified address of the agency or minister	The time at which the letter would be delivered in the ordinary course of post[34]
Delivery to a central or regional office	The date of delivery
Electronic communication to a specified email or fax address	The date the communication is capable of being retrieved by the agency at the specified email or fax address. [35]

7.84 As noted above at [7.79]–[7.80], an agency or minister can seek an extension of time from the Information Commissioner if the initial 30-day period has expired (s 51DA(3)). In deciding whether to allow an extension of processing time, the Commissioner will take into account any non-working days falling within the original period.

7.85 Processing a request for amendment can take a considerable period of time if the material is complex or the authenticity of claims or evidence needs to be verified. If it appears that more than 30 days may be necessary, the agency or minister should

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34 *Acts Interpretation Act 1901* s 29.

35 The time of receipt of electronic communications derives from s 14A of the Electronic Transactions Act 1999, which provides that an email or similar electronic communication is received at the time it is capable of being retrieved by the addressee. This is assumed to be the time it reaches the addressee's designated electronic address (this day could be a weekend or public holiday). This rule may be varied by a voluntary and informed agreement between the sender (the applicant) and the addressee (the agency or minister).

advise the applicant of the expected delay and their intention to apply to the Information Commissioner for an extension of time.

Acknowledging receipt

7.86 The FOI Act does not require agencies and ministers to acknowledge receipt of a request for amendment or annotation of personal information. However, it is good administrative practice for agencies and ministers to acknowledge receipt of an amendment or annotation request within 14 days, as required with requests for access to documents under the FOI Act.

Authorised decision making

7.87 Like decisions relating to requests for access to documents under Part III of the FOI Act, all decisions on the amendment of records held by agencies must be made by:

- the responsible minister
- the principal officer of the agency, or
- persons authorised under s 23 of the Act to make those decisions (see Part 3 of these Guidelines).

7.88 Requests made to ministers are treated differently. Section 23 does not provide for a minister to authorise decision makers. In practice, however, it is open to a minister to authorise a staff member in the minister's office or the responsible portfolio department to act on the minister's behalf. It would be prudent for such arrangements to be in writing. A decision maker in these circumstances will be acting as an agent of the minister and the decision will be regarded as a decision of the minister.

Charges

7.89 There are no charges for processing applications for amendment or annotation of records because they concern the applicant's own personal information (reg 5 of the Charges Regulations). For further guidance on charges see Part 4 of these Guidelines.

Comments on annotations

7.90 An agency or minister must attach a requested annotation to an applicant's document or file unless the annotation is irrelevant, defamatory or unnecessarily voluminous.

7.91 Section 51E provides that the agency or minister may also attach their own comments to an annotation under ss 51 or 51B. This would be appropriate if the annotation is complex or requires further explanation. Adding a relevant comment will help to ensure that the record presents a comprehensive picture to later readers who may not be aware of the circumstances leading to the annotation.

Reviews and complaints

7.92 A decision maker must advise the applicant of their review rights in the statement of reasons if a request for amendment or annotation is refused (see [7.55] above). Review

rights include internal review and IC review. A complaint can also be made to the Information Commissioner about the handling of a request.

7.93 Further guidance on the review and complaint processes, including AAT review of IC review decisions, is in Parts 9, 10 and 11 of these Guidelines.

7.94 A person may also complain to the Information Commissioner under the Privacy Act.[36]

[36] The Privacy Act sets out a number of Australian Privacy Principles. In general, where an organisation breaches one of the principles, the individual can complain. APP 10 concerns the quality of personal information. APP 10.1 provides that 'An APP entity must take such steps as are reasonably necessary in the circumstances to ensure that the personal information that it collects is accurate, up-to-date and complete' and APP 10.2 provides that 'An APP entity must take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is, having regard to the purpose of the use or disclosure, accurate, up-to-date, complete and relevant'. A person may complain to the Information Commissioner about a breach of APP 10.1 or 10.2.