



‘N’ and Department of Immigration and Citizenship [2012] AICmr 26 (31 October 2012)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant:	‘N’
Respondent:	Department of Immigration and Citizenship
Decision date:	31 October 2012
Application number:	MR11/00097
Catchwords:	Freedom of information — Amendment of personal records — Whether a record of date of birth should be amended — (CTH) <i>Freedom of Information Act 1982</i> s 48, 50, 55D

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Summary

1. I affirm the decision of the Department of Immigration and Citizenship (the **Department**) of 31 March 2011 not to amend its record of the applicant’s date of birth under the *Freedom of Information Act 1982* (the **FOI Act**).

Background

2. On 25 January 2011, the applicant applied to the Department to amend its record of his date of birth from 25 December 1942 to 3 July 1940. On 8 February 2011 and on 31 March 2011 (following a request for internal review) the Department refused to make that amendment. On 19 April 2011, the applicant sought IC review of the Department's internal review decision under s 54L of the FOI Act.

Decision under review

3. The decision under review is the internal review decision of the Department on 31 March 2011 to refuse to amend its record of the applicant's date of birth.

Amendment of personal records

4. Under s 48 of the FOI Act, a person may apply to an agency for amendment or annotation of documents of the agency that contain personal information that is incomplete, incorrect, out of date or misleading.
5. Under s 50(1), an agency may amend the record where it is satisfied that the information that it contains is incomplete, incorrect, out of date or misleading.
6. Under s 50(2), an amendment may be made by altering the document concerned to make the information complete, correct, up to date or not misleading; or by adding a note specifying the respects in which the information is incomplete, incorrect, out of date or misleading.
7. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that s 50:

... 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. ...

The applicant's opinion is not determinative; it is for the agency to be satisfied that the applicant's claims are correct.¹
8. Furthermore, when assessing what weight to give to evidentiary documents, the decision maker should consider the context in which the information was first provided and documented. The material that an applicant needs to provide to support their claim will vary according to each case.² The more significant the effect of the amendment sought, the greater weight of evidence that would be required to justify the amendment.³

¹ *Guidelines*, [7.27]–[7.28].

² *Guidelines*, [7.28].

³ See *'M' and Department of Immigration and Citizenship* [2012] AICmr 23, [8].

Issues

9. The issues to be decided in this IC review are whether the Department's record of the applicant's date of birth is incorrect and, if so, whether and how the record should be amended.
10. Section 55D(1) of the FOI Act provides that, in an IC review, the agency or minister concerned has the onus of establishing that its decision is justified, or that the Information Commissioner should give a decision adverse to the IC review applicant. The onus is on the Department to demonstrate that, on the balance of probabilities, the currently recorded date of birth is not incorrect or that it should not be amended.⁴

Is the currently recorded date of birth incorrect?

11. The applicant says that he was born in a small village in rural China. The applicant claims his date of birth was never registered, that he was not born in a hospital, and that there are no medical records of his birth.
12. In his application to migrate to Australia, and in his subsequent application for Australian citizenship, the applicant said his date of birth was 25 December 1942. No evidence was given for this birth date other than the applicant writing this date on his visa application and subsequent applications.
13. The applicant's mother died in 1991. The applicant says that, in 2001, his brother told him that he (the applicant) was born on 3 July 1940. His brother, he says, also told him that their mother had chosen the 25 December 1942 date for superstitious reasons.
14. In 2002, the applicant's brother applied to the village committee in China on behalf of the applicant to obtain a certificate recognising the applicant's date of birth as 3 July 1940. The committee issued a certificate giving that date as the applicant's birth date.
15. According to the Department, the committee's decision was based on verbal claims from the applicant's family and other people in the village. These claims included information about the age of the applicant's mother, the date when the applicant's father died, and the birth dates of other people in the village who were in the same school class as the applicant.
16. Using the certificate issued by the village committee, the applicant has had his date of birth recorded as 3 July 1940 on various official documents in Australia including his driver's licence, records held by Centrelink, Medicare, the Australian Taxation Office, and his superannuation fund. In 2011, the village committee issued a second certificate also giving the applicant's date of birth as 3 July 1940.

⁴ See '*K*' and *Department of Immigration and Citizenship* [2012] AICmr 20, [12]–[14].

17. The applicant says that he wants the Department's record amended because he now has an official Chinese record of his date of birth as 3 July 1940, and he wants his Australian records to reflect this date to prevent any problems when travelling between Australia and China.
18. The Department refused to amend its records. The Department gave little weight to the certificates issued by the village committee, taking the view that these could not be regarded as official records of the applicant's date of birth. The Department also expressed concern that the certificates were based on verbal claims. The Department also noted that the applicant had used 25 December 1942 as his date of birth throughout his life until 2002.

Findings

19. In rejecting the applicant's amendment application, the Department put 'considerable weight' on the fact that the applicant had used 25 December 1942 as his date of birth for about 58 years. I do not think that this is an important consideration. As noted above,⁵ more evidence is required to justify an amendment of more significant effect. But the effect of the amendment that the applicant is seeking is not 58 years of having used a different date; it is a change to his date of birth by less than three years. If the applicant had provided strong evidence of a different date of birth, it would not have mattered how long he had been using the 1942 birth date. However, the applicant has not been able to produce any strong evidence of a different date of birth.
20. The Department's record of the applicant's date of birth is based on information provided to it on visa and citizenship application documents. The certificates provided by the village committee in 2002 and 2011 are the principal evidence that the Department's records are incorrect. The certificates were issued without any documentary basis. No other official document supports the applicant's claim that he was born in 1940 and not in 1942.
21. The information upon which the Department's record is based was self-reported; it is, arguably, no more reliable than the information that the applicant now provides in support of his amendment application. However, the question is not which of the two dates is the more reliable;⁶ the question is whether the currently recorded date of birth is incorrect. Section 55D of the FOI Act places on the Department the onus of establishing that it is not incorrect. The Department has done that. I am satisfied that, on the balance of probabilities, the currently recorded date of birth is not incorrect.

⁵ See [8] above.

⁶ That is the test that is applied when deciding whether to amend a record, having decided that the existing record is incorrect: see *K' and Department of Immigration and Citizenship* [2012] AICmr 20, [33]–[40]. In that IC review, the Department's record was incorrect and had to be amended because the date proposed by the applicant (although not strongly supported) was closer to the applicant's actual date of birth than the one on the Department's records.

Should the Department's record be amended?

22. Given my finding about the currently recorded date of birth, there is no need for me to consider whether and how the record should be amended.

Decision

23. Under s 55K of the FOI Act, I affirm the Department's decision of 31 March 2011.

James Popple
Freedom of Information Commissioner

31 October 2012

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.