



‘O’ and Department of Immigration and Citizenship [2012] AICmr 27 (6 November 2012)

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

Applicant:	‘O’
Respondent:	Department of Immigration and Citizenship
Decision date:	6 November 2012
Application number:	MR11/00105
Catchwords:	Freedom of information — Amendment of personal records — Whether a record of date of birth should be amended — Weight to put on a copy document when original document not provided — (CTH) <i>Freedom of Information Act 1982</i> ss 48, 50, 55D

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Summary

1. I affirm the decision of the Department of Immigration and Citizenship (the **Department**) of 15 April 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 14 March 2011, the applicant applied to the Department to amend its record of his date of birth from 20 February 1954 to 20 February 1947. On 15 April 2011, the Department refused to make that amendment.
3. On 11 May 2011, the applicant sought IC review of that decision under s 54L of the FOI Act.

Decision under review

4. The decision under review is the decision of the Department on 15 April 2011 to refuse to amend its record of the applicant's date of birth.

Amendment of personal records

5. 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for amendment or annotation of documents of the agency that contain personal information that is incomplete, incorrect, out of date or misleading.
6. 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an agency may amend the record where it is satisfied that the information that it contains is incomplete, incorrect, out of date or misleading.
7. 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date or not misleading; or by adding a note specifying the respects in which the information is incomplete, incorrect, out of date or misleading.
8. 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

¹ *Guidelines*, [7.27]–[7.28].

9. 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. This is particularly important where the applicant has no documents to support their application of amendment other than a statutory declaration stating their case.² The material that an applicant needs to provide to support their claim will vary according to each case.³ The more significant the effect of the amendment sought, the greater the weight of evidence that would be required to justify the amendment.⁴

Issues

10. 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.
11. 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.⁵

Is the currently recorded date of birth incorrect?

12. The currently recorded date of birth is based on information obtained by the Department at an interview with the applicant when he applied to migrate to Australia. The applicant did not have any documentary proof of his date of birth at that time. He did not speak or read English, and provided information through an interpreter. He says that he told the interpreter that he was born on 20 February 1947, but the interpreter wrongly translated this as 20 February 1954.
13. In 1990, the applicant's mother migrated to Australia. The applicant says that, at that time, his mother gave him his original birth certificate which indicated that he was born in 1947.
14. The applicant says that in 2008 he travelled to Cambodia and sought to authenticate his birth certificate with the Cambodian authorities. He went first to the Australian Embassy and arranged for the Vice-Consul to certify a copy of the birth certificate and of an English translation of the certificate. He then provided the original certificate to a local man who was assisting him, and who said that he would arrange verification of its authenticity. The applicant claims

² *Guidelines*, [7.31].

³ *Guidelines*, [7.28].

⁴ See '*N*' and *Department of Immigration and Citizenship* [2012] AICmr 26, [8], [19]. See also '*M*' and *Department of Immigration and Citizenship* [2012] AICmr 23, [8].

⁵ See '*K*' and *Department of Immigration and Citizenship* [2012] AICmr 20, [12]–[14].

that that man subsequently refused to return the original certificate to him unless he was paid a substantial amount of money; the applicant did not pay, and the certificate was not returned.

15. The Department points out that, of all the documents that the applicant has provided in support of his amendment application, only his birth certificate gives the 1947 birth date; others give the 1954 birth date. And, because the applicant did not provide the original certificate, that document 'cannot be subjected to further examination by the [Department's] Document Examination Unit or verification by the issuing authority'.

Findings

16. I think it is appropriate for the Department to put less weight on a copy of a document than on the original document: it is harder to authenticate a copy—even a certified copy—than the original. The Vice-Consul's certification of the copy could only have been as to the veracity of the copy, not to the authenticity of the original certificate or of the English translation.
17. The applicant has made a statutory declaration that he was born on 20 February 1947. He has also provided statements by three other people, each supporting that birth date. Two of those statements do not explain how the person making the statement knows when the applicant was born. In the third—a statutory declaration—the person making the declaration says that he can attest to the 1947 birth date because he has known the applicant since childhood. I give these statements little weight.
18. The information upon which the Department's record is based was self-reported and may have been mistranslated; 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.

Should the Department's record be amended?

19. 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.

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.

Decision

20. Under s 55K of the FOI Act, I affirm the Department's decision of 15 April 2011.

James Popple
Freedom of Information Commissioner

6 November 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.