OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Refs: F2008038 & F2008119 Decision Ref: D0132008

Participants:

Désiré Edgar Michel Mallet
Complainant

- and -

Edith Cowan University
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – applications for amendment of personal information under Part 3 of the *Freedom of Information Act 1992* – refusal to amend personal information by way of s.48(1) - whether disputed information is inaccurate, incomplete, out of date or misleading.

Freedom of Information Act 1992 (WA) ss.45(1); 48(1); 48(3); 50; 66(6); Schedule 1; Schedule 2 Glossary

Freedom of Information Act 1982 (Vic)

Re Mallet and Edith Cowan University **[2005]** WAICmr 19.
Re Setterfield and Chisholm Institute of Technology and Others **[No.2]** (1986) 1 VAR 202.
Re Mann v Medical Practitioners Board of Victoria (1997) VCAT 588

DECISION

The decisions of the agency are confirmed. The decisions not to amend the disputed documents under s.48 of the *Freedom of Information Act 1992* are justified.

John Lightowlers
A/INFORMATION COMMISSIONER

29 April 2008

REASONS FOR DECISION

BACKGROUND

1. These are applications for external review by the Information Commissioner arising out of two separate decisions by Edith Cowan University ('the agency') not to amend information in accordance with Part 3, s.48(1) of the *Freedom of Information Act 1992* ('the FOI Act') in accordance with requests made by Mr Désiré Edgar Michel Mallet ('the complainant'). Whilst the two matters deal with different documents, the issue for my determination is the same in both matters. Therefore, I have decided to deal with both matters in this decision.

2. I understand that the complainant was enrolled as a graduate student at the agency. In a letter dated 19 February 2001, the complainant was advised that, as a result of a meeting of the Faculty of Community Services, Education and Social Science, Executive Board of Examiners ('the Board of Examiners'), held on 9 February 2001, he was to be excluded from his doctoral studies for a period of one year. The documents relating to that decision of the agency were sought by the complainant under the FOI Act and are the subject of a decision by the former A/Information Commissioner: see *Re Mallet and Edith Cowan University* [2005] WAICmr 19.

3. In an application dated 14 December 2007 (our reference F2008038), the complainant applied under s.45(1) of the FOI Act to the agency for amendment of personal information that relates to some of the documents the subject of the above decision, by having a notation placed on all copies of the letter dated 19 February 2001 which was sent by then A/Professor Mark Hackling to the complainant ('the Letter'). In another application dated 17 March 2008 (our reference F2008119), the complainant applied under s.45(1) of the FOI Act to the agency for amendment of personal information by having a notation placed on a memorandum dated 19 February 2001 from Judith Rivalland, then Associate Dean, Teaching and Learning to Student Administration ('the Memorandum'). The Letter and the Memorandum are the disputed documents in this matter.

4. The agency refused to amend the information in accordance with the complainant's applications because it is not satisfied that the disputed documents contain information which is inaccurate or misleading, as provided in s.48(1) of the FOI Act. On 1 February 2008 and 17 April 2008, the complainant applied for external review by the Information Commissioner of the agency's decisions.

REVIEW BY THE INFORMATION COMMISSIONER

5. In relation to F2008038, I required the agency to produce to me the FOI file relating to the complainant's access application and other documents relevant to this matter. In addition, my Investigations Officer made inquiries with the agency concerning the issues relating to this complaint.

6. In respect of F2008119, I decided to accept the application for external review under s.66(6) of the FOI Act, even though the complainant had not first sought internal review of the agency's decision dated 15 April 2008. I accepted the complaint without internal review because I was dealing with a matter involving the same parties and similar issues, although the disputed documents are different, and I considered that it would expedite the outcome for both the complainant and the agency which in my view is in keeping with the spirit and intent of the FOI Act.

7. In relation to F2008119, I obtained copies of the complainant's application for amendment and the agency's notices of decision from the agency. I did not require the production to me of the Memorandum as a copy of that document had been previously provided to me.

8. In relation to F2008038, my Investigations Officer wrote on 18 February 2008 to the parties providing them with a conciliation proposal, which was that a notation be placed on the Letter in accordance with s.50 of the FOI Act. Section 50 of the FOI Act relevantly provides:

> *"**50. Request for notation or attachment disputing accuracy of information***
>
> *(1) If the agency decides not to amend the information in accordance with the application the person may, in writing, request the agency to make a notation or attachment to the information –*
>
> *(a) giving details of the matters in relation to which the person claims the information is inaccurate, incomplete, out of date or misleading and*
>
> *(b) if the person claims the information is incomplete or out of date – setting out the information that the person claims is needed to complete the information or bring it up to date.*
>
> *(2) …*
>
> *(3) The agency has to comply with the request unless it considers that the notation or attachment that the person has requested to be made to the information is defamatory or unnecessarily voluminous.*
>
> *(4) …*
>
> *(5) …"*

9. The agency accepted the conciliation proposal. The notation was placed on the Letter and the complainant was advised of such. My office then considered the matter finalised. The complainant however, did not accept that the notation should be placed on the file in accordance with s.50 and maintained his position that the notation should be placed on the Letter in accordance with s.48(1) of the FOI Act because in his submission the information in the Letter is inaccurate

and misleading. The complainant therefore did not accept the conciliation proposal.

AMENDMENT OF PERSONAL INFORMATION

10. Part 3 of the FOI Act deals with the right of a person to apply to an agency for the amendment of personal information about the person contained in a document of the agency and prescribes the procedures to be followed by the agency in dealing with an application for amendment. Section 45(1) provides that an individual has the right to apply for such an amendment if the information is inaccurate, incomplete, out of date or misleading. The person seeking the amendment must give details of the matters in relation to which the person believes the information is inaccurate, incomplete, out of date or misleading and the person must give reasons for holding that belief.

11. If an agency decides to amend its records, s.48(1) provides that it may do so by alteration, striking out or deletion, inserting information or inserting a note in relation to the information. In effect, a notation made under s.48 is an acknowledgement by the agency that it accepts that one or more of the preconditions to s.48 have been established; that is, that the information to be amended is inaccurate, incomplete, out of date or misleading. By contrast, a notation made under s.50 gives an applicant's view of the information to be amended and does not necessarily imply that the agency concurs with the notation.

12. However, s.48(3) provides that an agency is not to amend information in a way that obliterates or removes the information, or results in the destruction of a document containing the information, unless the Information Commissioner certifies in writing that it is impracticable to retain the information or that, in the opinion of the Information Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information. There is no such request before me in these complaints.

The disputed information

13. In F2008038, the disputed information consists of the following sentences:

> *"The Faculty of Community Services, Education and Social Science, Executive Board of Examiners met on February 9 to review your academic progress."*
>
> and
>
> *"At its meeting on February 9, the Board of Examiners, after a very careful consideration of the issues and consistent with Rule 33(6), resolved to exclude you from the Doctor of Philosophy* [sic] *for a period of one year."*

14. In F2008119, the disputed information consists of the following sentences:

> *"At the Board of Examiners' meeting held on 9 February 2001 the progress of Desire Mallet a PhD student was considered."*
>
> and
>
> *"The student should be excluded for a one year period with re-enrolment conditions as follows:…"*

The complainant's submission

15. The complainant has made a number of extensive submissions to me in relation to these matters. His submissions are very detailed and largely the same for both matters. However, a significant part of the information contained in those submissions is not relevant to the matters that I must decide.

16. In brief, the complainant contends that the disputed documents contain inaccurate and misleading information with respect to his exclusion from his doctoral studies. In particular, the complainant submits that he was never properly excluded from his doctoral studies. The complainant contends that the disputed documents are inaccurate because the agency did not exclude him from his doctoral studies in accordance with its own rules for dealing with such matters.

17. The complainant claims that the Board of Examiners did not meet on the date as asserted by the agency in the disputed documents. He therefore says there was no decision of the Board of Examiners to exclude him from his studies. The complainant has referred me to the former A/Information Commissioner's decision in *Re Mallet* which the complainant claims vindicates his position that there was no meeting of the Board of Examiners and therefore there was no decision to exclude him from his doctoral studies. The complainant also submits that the disputed documents are prejudicial to him because he has not been able to obtain a doctorate from any other university in the State.

18. The complainant provided the agency with a notation drafted by him which he asks to be placed on each of the disputed documents, pursuant to s.48 of the FOI Act.

The agency's submission

19. The agency's reasons for not amending the disputed information are essentially the same in both matters.

20. The agency, in its notice of decision dated 10 January 2008 (F2008038), did not accept that the disputed information was inaccurate or misleading because:

> *"ECU has acknowledged that aspects of the process regarding the decision to exclude the applicant from the Doctor of Philosophy* [sic] *were unsatisfactory, but this is not to say that the exclusion never happened.*

Similarly, A/Information Information [sic] *Commissioner's statements in the decision dated 7 November 2005* [Re Mallet] *referred to serious questions being raised about ECU's administrative processes and/or record-keeping practices and indicated that it was not possible to establish clearly what happened in the process relating to Mr Mallet's exclusion. Yet, this does not mean that the applicant had never been excluded from the Doctor of Philosophy, and no such conclusion was reached in the decision.*

The letter from A/Professor Mark Hackling is one of three documents relating to the decision to exclude the applicant from the Doctor of Philosophy that were provided under the FOI process and considered in the decision of the A/Information Commissioner of 7 November 2005. The letter provides evidence that the decision to exclude the applicant was made (even though the lack of other records is unsatisfactory). I am confident that the letter was written in good faith and was not inaccurate or misleading. In my view, subsequent developments regarding the exclusion decision do not change this position. The fact that the applicant appealed against this decision, first to the Committee of Review and subsequently to the Academic Appeals Committee indicates that both ECU and the applicant understood at the time that Mr Mallet had been excluded. Moreover, any defect in the process was corrected when the applicant's appeal to the Academic Appeals Committee against exclusion was successful and he returned to his studies…"

21. In its notice of decision dated 15 April 2008 (F2008119), the agency also stated:

"…The memorandum dated 19 February 2001 is one of three documents relating to the decision to exclude the applicant from the Doctor of Philosophy that were [sic] *provided under the FOI process and considered in the decision of the A/Information Commissioner of 7 November 2005. The memorandum provides evidence that the decision to exclude the applicant was made (even though the lack of other records is unsatisfactory). I am confident that the memorandum was written in good faith and was not inaccurate or misleading. In my view, subsequent developments regarding the exclusion decision do not change this position. The fact that the applicant appealed against this decision, first to the Committee of Review and subsequently to the Academic Appeals Committee indicates that both ECU and the applicant understood at the time that Mr Mallet had been excluded. Moreover, any defect in the process was corrected when the applicant's appeal to the Academic Appeals Committee against his exclusion was successful and he returned to his studies."*

22. The agency submits that the former A/Commissioner in the decision in *Re Mallet* did not determine whether in fact a meeting had or had not taken place, but rather the A/Commissioner stated at paragraph 46:

"Because the people interviewed cannot now recall attending such a meeting does not necessarily mean the meeting did not take place. However, in the

absence of those memories and any proper record of it, it is not now possible to establish clearly what happened."

CONSIDERATION

Is the disputed information personal information concerning the complainant?

23. In the Glossary in Schedule 2 to the FOI Act, the term "personal information" is defined to mean:

> *"…information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*
>
> *(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
> *(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*

24. I have examined the disputed documents and I am satisfied that they contain personal information as that term is defined in the FOI Act about the complainant.

25. The disputed documents relate specifically to the complainant. They contain a brief history of his progress in his doctoral studies; the resolution of the Board of Examiners to exclude the complainant from his doctoral studies for a period of one year; an outline of the consequences to the complainant for being excluded; and the options available to the complainant at the completion of the exclusion period.

26. I am satisfied that the disputed information is personal information, as defined, about the complainant and therefore may be the subject of an application for amendment under s.45(1) of the FOI Act.

Is the information inaccurate or misleading?

27. Having regard to the submissions and to the decision of the former A/Commissioner in *Re Mallet*, I find that the disputed documents contain the understanding of the authors of the disputed documents based on the information available to them at the time they wrote those documents. There is no evidence in the material presently before me to suggest that either Dr Rivalland or A/Professor Hackling's advices contained in the disputed documents were wrong. The reference to the holding of a meeting on a particular date remains uncertain, although no information has been identified which confirms that a meeting of those said to be present did in fact occur on that date. The former A/Commissioner has already expressed a view that it is not now possible to establish clearly what happened. I see no reason to disagree with that view. The fact that the complainant

challenges the validity of his exclusion does not, of itself, establish that the information concerning that exclusion is inaccurate or misleading.

28. There is evidence before me that the complainant was excluded from his doctoral studies. In particular, he appealed that exclusion. His appeal was ultimately upheld and he was offered a place back at the agency.

29. Whether or not the exclusion, or decision to exclude was a valid or effective exclusion or decision is not in my view a factor in deciding whether to amend personal information. Section 45 is not directed at the rewriting of history; it is about whether the recorded information is inaccurate, incomplete, out of date or misleading.

30. In *Re Setterfield and Chisholm Institute of Technology and Others* [No.2] (1986) 1 VAR 202 at 209 Lewis PM considered the application of s.39 of the Victorian *Freedom of Information Act 1982,* which is the equivalent section to s.48 of the FOI Act.

31. In that matter, Lewis PM considered the vital factor for consideration is *"…whether s.39 can be used to add a commentary to a document which would affect legal rights between the parties without altering the narrative in any way."* In *Re Mann v Medical Practitioners Board of Victoria* (1997) VCAT 588, the Tribunal again considered s.39 and agreed with the views expressed by Lewis PM in *Re Setterfield.*

32. I consider that the result which the complainant from his extensive submissions apparently is seeking to achieve by these applications – a determination as to whether his exclusion from his doctoral studies was valid – does not fall within the provisions of s.45 of the FOI Act nor was it contemplated by the Parliament when considering the legislation and is therefore not within my jurisdiction to determine. As the Tribunal states *"… s.39 is not concerned with anything more than recalling accurately what occurred and if the resolution to dismiss Mrs Setterfield was recorded accurately, whether it was an unlawful resolution or not, has got nothing to do with s.39 or in turn this Tribunal."*

33. From his submissions, the complainant is seeking to challenge the legal effect of the agency's decision in managing its graduate and doctoral students. In my view, as in the case of *Re Setterfield* these are not matters properly to be determined by FOI proceedings.

34. Section 45 is not intended to enable decisions of agencies to be changed or appeals against decisions to be made under the guise of amending records. It is not intended as a means of reviewing the effect of the decision of the agency with which the applicant is dissatisfied.

35. I am not persuaded that the disputed information is inaccurate or misleading and therefore I am not persuaded that it should be amended as requested.

Notation

36. Under s.50 of the FOI Act, if an agency decides not to amend personal information, the person may write to the agency and ask it to make a notation or attachment to the information. The notation or attachment is to give the details of the matters in relation to which the person claims the information is inaccurate, incomplete, out of date or misleading. Unless it considers the notation or attachment to be defamatory or unduly voluminous, an agency must comply with such a request.

37. The agency has consistently expressed its willingness to attach such a notation to the disputed documents. In respect of F2008038, the agency did attach a notation to the disputed document. However, the complainant is not prepared to accept a notation under s.50. Instead, he seeks to have the information amended under s.48(1). It appears to me that the most appropriate way of including the complainant's concerns on the agency's files is not an option the complainant is prepared to consider. Accordingly, as I have found that there should not be a notation placed on the file in accordance with s.48(1) and the complainant is not prepared to accept a notation under s.50, his views will not as a result be recorded on the agency's files under either section.

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