

Notice of Decision and Reasons for Decision

Applicant:	'AF5'
Agency:	Department of Health and Human Services
Decision Date:	6 June 2019
Exemptions considered:	30(1), 33(1), 35(1)(b)
Citation:	'AF5' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 50 (6 June 2019)

FREEDOM OF INFORMATION – child protection – case note – personal information – *Children, Youth and Families Act 2005* – internal working document – personal privacy – material obtained in confidence

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the document to the Applicant.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
6 June 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

...copies of the instrument of delegation of function(s) pursuant to section 17 of the Children Youth and Families Act 2005 in relation to the employees [first named employee], [second named employee], and copies of the approval to place my children [children's names and dates of birth], in accommodation between [date range].
2. By letter dated 21 March 2019, the Agency notified the Applicant it had 'located the requested documents', and of its decision to refuse access to all documents in full.
3. In refusing access to the documents, the Agency relied on sections 30(1), 31(1)(a), 31(1)(c), 33(1), and 35(1)(b).

Review

4. On 25 March 2019, the Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. On 8 April 2019, the Agency informed OVIC by email that two documents fell within the scope of the Applicant's request:
 - (a) the Instrument of delegation of function pursuant to section 17 of the *Children, Youth and Families Act 2005* (Vic) (**Instrument of Delegation**); and
 - (b) the Case Note regarding the approval to place the Applicant's children in accommodation.
6. The Agency further advised the Instrument of Delegation could be released to the Applicant in full. Accordingly, this document is not subject to review. The Case Note (the **Document**) is the only document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications received from the parties, including:
 - (a) the Agency's decision dated 21 March 2019;
 - (b) the Applicant's request for review dated 25 March 2019; and
 - (c) the Agency's submissions dated 18 April 2019.
9. I have been briefed by OVIC staff who inspected the Document claimed to be exempt under section 31(1).¹
10. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies; limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

Review of exemptions

11. The Agency relied on the exemptions under sections 30(1), 31(1)(a), 31(1)(c), 33(1), and 35(1)(b) to refuse access to the Document in full. The Agency's decision letter sets out the reasons for its decision.
12. Having considered the relevant exemptions in sections 30(1), 33(1) and 35(1)(b), I have determined certain information in the Document is exempt.

Section 33(1) – Information relating to the personal affairs of any person

13. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of a document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;² and
 - (b) such disclosure would be 'unreasonable'.

Does the Document contain the 'personal affairs information' of individuals other than the Applicant?

14. Information will relate to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.³ It has also been held information will relate to a person's personal affairs if it 'concerns or affects that person as an individual'.⁴
15. The Victorian Civil and Administrative Tribunal (**VCAT**) has accepted a document will disclose personal affairs information if it is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed.⁵ As disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.
16. The Document contains the names, ages, and other personal information of the Applicant and third parties.
17. I am satisfied information in the Document relates to the personal affairs of individuals other than the Applicant.

Would disclosure of the personal affairs information be unreasonable?

18. In deciding whether the exemption applies, it is necessary to determine whether disclosure of personal affairs information in the Document would be unreasonable. Consideration of whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
19. I adopt the view expressed by the Supreme Court of Victoria Court of Appeal in *Victoria Police v Marke*,⁶ in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.

² Sections 33(1) and (2).

³ Section 33(9).

⁴ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

⁵ *O'Sullivan v Department of Health & Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁶ [2008] VSCA 218 at [76].

20. As also stated in *Victoria Police v Marke*, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁷
21. I acknowledge the Applicant may already know the third parties named in the Document. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁸
22. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.⁹
23. I consider the following factors are relevant in considering whether disclosure of the personal affairs information in the document would be unreasonable:

(a) The nature of the personal affairs information

The personal affairs information relates to the identity of third parties, including the Applicant's children, their mother, and the full name of a child protection practitioner (**practitioner**). It relates to the Agency's Child Protection functions.

I consider the personal affairs information of the children is sensitive, particularly in light of their age and the scope for ongoing Child Protection involvement by the Agency.

I consider the personal affairs information of the children's mother is sensitive in light of the circumstances in which the information was obtained by the Agency.

I am satisfied releasing the personal affairs information relating to the children and their mother would be unreasonable in the circumstances.

I consider these factors weigh against disclosure.

In relation to the Agency practitioner's name, VCAT has generally accepted there is nothing particularly sensitive about matters occurring or arising out of the course of one's official duties.¹⁰

In this case, the Applicant referred to the Agency practitioner by name in his application for review and identified their involvement in the decision made. In these circumstances, I am satisfied releasing the name of the Agency practitioner would not be unreasonable in the circumstances.

(b) The circumstances in which the information was obtained

The sensitive personal affairs information in the Document was obtained by the Agency in the context of exercising its Child Protection functions under the CYF Act. I consider this factor weighs against disclosure.

(c) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

The FOI Act provides a general right of access that can be exercised by any person regardless of their motive or purpose for seeking access to a document. However, the reasons why an

⁷ [2008] VSCA 218 at [79].

⁸ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁹ [2008] VSCA 218 at [104].

¹⁰ *Milthorpe v Mt Alexander Shire Council* (1997) 12.

applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.

In his application for review, the Applicant indicated:

[redacted]

I acknowledge the Applicant's strong personal interest in the Document, and the public interest in ensuring Agency officers lawfully carry out their duties under the CYF Act under the necessary delegation or authority. I consider this factor weighs in favour disclosure.

I consider the Applicant's purpose for seeking the information is likely to be achieved by granting access to the Document. I consider this factor weighs in favour of disclosure.

(d) Whether the individuals to whom the information relates objects, or would be likely to object to the release of the information

There is no information before me to suggest the Agency consulted with the individuals to whom the personal affairs information relates. However, given the nature of the sensitive personal affairs information and the circumstances in which it was obtained, I am of the view the individuals, whose personal information is in the Document, would be likely to object to the release of that information. I consider this factor weighs against disclosure.

24. Having weighed up the above factors, I have determined disclosure of the personal affairs information in the Document, with the exception of the Agency practitioner's name, would be unreasonable in the circumstances.
25. Accordingly, I have determined that with the exception of the Agency practitioner's name, the personal affairs information in the document is exempt under section 33(1).
26. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the application of section 33(1) to the Document.

Section 35(1)(b) – Documents containing material obtained in confidence

27. A document is exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
28. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator. Confidentiality can be express or implied from the circumstances of a matter.¹¹
29. In light of the nature of the information and the context in which it was provided to the Agency, I am satisfied certain information in the Document was communicated by individuals to the Agency in confidence. Accordingly, I am satisfied disclosure of the Document would divulge information communicated in confidence to the Agency.
30. Section 35(1)(b) also requires consideration of whether an Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This

¹¹ XYZ v Victoria Police (2010) 33 VAR 1; [2010] VCAT 255 at [265], citing Barling v Medical Board (Vic) (1992) 5 VAR 542 at [561]-[562].

means I must be satisfied that, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.

31. The Agency's Child Protection functions are based on the legal framework set out in the CYF Act. Child Protection intervention occurs when it is assessed that a child has suffered, or is likely to suffer, significant harm and the child's parent is either unable or unwilling to protect the child from harm. The harm may be a single incident or cumulative in nature.
32. The Agency relies on certain persons to make reports to the Agency in order to carry out its Child Protection functions under the CYF Act and there is an essential public interest in individuals being able to disclose sensitive information to the Agency relevant to its Child Protection functions.
33. In this case, I accept dissemination of information about Child Protection notifications or information provided to the Agency during its involvement in a Child Protection matter would undermine the integrity of the notification, intake and investigation process. This may in turn result in the reluctance of individuals, other than mandatory reporters,¹² to make notifications or provide other information to the Agency regarding Child Protection matters in the future.
34. I am satisfied full disclosure of the Document would involve divulging information communicated to the Agency in confidence, and that disclosure would be reasonably likely to impair the ability of the Agency to obtain similar information in future. Accordingly, I am satisfied the relevant information in the document is exempt under section 35(1)(b).
35. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the application of section 35(1)(b) to the Document.

Section 30(1) – Internal working documents

36. Section 30(1) has three requirements:
 - (a) a document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
37. The exemption does not apply to purely factual material in a document.¹³
38. In *Re JE Waterford and Department of Treasury (No. 2)*, the Commonwealth Administrative Appeals Tribunal held:

... "deliberative process" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹⁴

¹² A range of professional groups are listed in section 182(1) of the CYF Act as mandatory reporters. Mandatory reporters must make a report to Child Protection as soon as practicable after forming a belief on reasonable grounds that a child has suffered or is likely to suffer significant harm as a result of physical injury or sexual abuse, and the child's parents are unable or unwilling to protect the child.

¹³ Section 30(3).

¹⁴ [1984] AATA 67 (14 March 1984).

39. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the staff of the agency, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
40. I am satisfied the Document discloses matters in the nature of an opinion by an officer – in this case, a Child Protection practitioner – in the course of and for the purpose of a deliberative process involved in the Agency's assessment and decision regarding the accommodation of the Applicant's children.
41. In deciding whether disclosure of the information would be contrary to the public interest, it is necessary to balance relevant considerations, remaining mindful the object of the FOI Act is to facilitate and promote disclosure of information.
42. In deciding disclosure of the Document would be contrary to the public interest, I have had regard to the Applicant's personal interest in accessing the Document. I have also had regard to the high degree of sensitivity of the issues involved, and the nature of the information in the Document.
43. In the circumstances, I consider the public interest in ensuring the confidentiality of the Agency's deliberations and maintaining the integrity of the Agency's processes in relation to such assessments outweighs the Applicant's personal interest in the Document. Accordingly, I am satisfied the relevant information in the Document is exempt under section 30(1).
44. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the application of section 30(1) to the Document.

Deletion of exempt or irrelevant information

45. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
46. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ and the effectiveness of the deletions.
47. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁶
48. I have considered the effect of deleting exempt information from the Document. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and an edited copy of the Document would retain meaning.

Conclusion

49. With the exception of the Agency practitioner's name, which I am satisfied is not exempt under section 33(1), I am satisfied the information exempted by the Agency under sections 33(1), 35(1)(b) and 30(1) is exempt.
50. As it is practicable for the exempt information in the Document to be deleted, I have determined it is practicable for the Document to be released to the Applicant in part.

¹⁵ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

Review rights

51. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁷
52. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
53. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
54. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
55. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.²⁰

When this decision takes effect

56. I have decided to release a document that contains information relating to the personal affairs of a third party.
57. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
58. For that reason, my decision does not take effect until that 60 day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

²⁰ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Instrument of Delegation	125	Refuse in full Sections 30(1), 31(1)(a), 31(1)(c), 33(1), and 35(1)(b)	Not subject to review	
2.	[Date]	Case Note	2	Refuse in full Sections 30(1), 31(1)(a), 31(1)(c), 33(1), and 35(1)(b)	<p>Release in part</p> <p>Sections 30(1), 33(1), 35(1)(b), 25</p> <p>The following information is not exempt and is to be released:</p> <ul style="list-style-type: none"> • All headings • On page 1: <ul style="list-style-type: none"> - the first line, comprising the title of the Document; - the second line, comprising the date and time; - the third line, comprising the subject; 	<p>With the exception of the Agency practitioner's name, which I am satisfied is not exempt under section 33(1) as I do not consider release of this information in the circumstances would be unreasonable, I am satisfied the information exempted by the Agency under sections 33(1), 35(1)(b) and 30(1) is exempt.</p> <p>As it is practicable for the exempt information in the Document to be deleted, I have determined it is practicable for the Document to be released to the Applicant in part.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> - the fourth line, comprising the name of the creator; and - under the second heading, the first and second paragraphs. • On page 2: <ul style="list-style-type: none"> - the second sentence in paragraph five; - the third sentence in paragraph five; - the single sentence following the second heading; and - the word following the third and final heading. 	