

Notice of Decision and Reasons for Decision

Applicant:	'AJ2'
Agency:	Department of Health and Human Services
Decision Date:	20 August 2019
Exemptions considered:	Sections 33(1) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with sections 191(1) and 209(1) of the <i>Children, Youth and Families Act 2005</i> (Vic)
Citation:	'AJ2' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 83 (20 August 2019)

FREEDOM OF INFORMATION – wardship records – ward of state file – care leaver records – personal affairs information relating to siblings – personal affairs information relating to deceased parents – secrecy provision

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 is the same as the Agency's decision in that I have decided to release the documents in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

20 August 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the initial request seeking access to the Applicant's 'wardship files'.
2. In its decision, the Agency identified 142 pages falling within the terms of the Applicant's request. It decided to release 111 pages in full and release 31 pages in part relying on section 33(1). In its decision letter, the Agency also relied on section 27(2) to decline to provide reasons for its decision as to do so would reveal 'prohibited information protected by the secrecy provision'.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 29 January 2019 and information provided with the Applicant's review application;
 - (c) the Agency's submission dated 30 January 2019; and
 - (d) communications between OVIC staff and the Applicant.

Submissions

Applicant's submission

7. The Applicant provided the following submission:

[Applicant's submission and personal reasons for seeking the documents]

Agency's submission

8. In relation to the application of section 33(1) the Agency provided the following submission:

The department has a duty to protect the privacy of persons who were in the department's care, especially those who were wards of the state.

... the information in the documents relating to third party individuals is highly sensitive, as it pertains to the personal affairs of the applicant's siblings, namely their behaviour in adolescence, conduct whilst at school and ...

9. The Agency also clarified the reference in its decision letter to section 27(2) should read section 38 and submitted:

Section 38 upholds the secrecy provisions of other legislation, such as sections 191(1) and 209(1) of the *Children, Youth and Families Act 2005* (CYF Act), which prohibit the disclosure of the identify of any person who has made a report regarding a child who they believe is in need of protection. Section 38

also prohibits the release of confidential information provided in the course of child protection investigations under the CYF Act...

Sections 191 and 209 of the CYF Act emphasise that child protection investigations are sensitive and confidential. During an investigation the department relies upon information gathered from various sources within the community, including child clients and their immediate families. These people generally expect that the information they provide to the department is confidential and free from the scrutiny of others.

The documents that fall within the scope of this application include a report made to the department regarding the wellbeing of the applicant's siblings and confidential information provided in the course of child protection investigations. It is essential that the department safeguard the confidentiality and privacy of the people who provided the information.

10. Whilst I note the Applicant's view that previous FOI requests made to the Agency have resulted in the inconsistent release of information in the Applicant's wardship file, in undertaking my review, I have only reviewed the Agency's most recent decision made on [specified date].
11. I have also had regard to the fact the Applicant, who is an adult, is a member of a family that had involvement with the Agency's Child Protection services.
12. 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.

Review of exemptions

13. The Agency relies on the exemptions under sections 33(1) and 38 to refuse access to parts of the documents. In relation to section 38, the Agency relies on the confidentiality provisions under sections 191(1) and 209(1) of the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).

Section 33(1)

14. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;¹ and
 - (b) such disclosure would be 'unreasonable'.
15. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.²
16. The information in the documents relates to the Applicant's parents, siblings, carers, Agency officers, other Agency clients and other third parties. The information includes names, position titles, detailed descriptions about personality, intelligence, behaviour and health, comments made by and to Agency officers and comments made by other third parties.
17. I am satisfied the information in the documents exempted by the Agency relates to individuals other than the Applicant.
18. In deciding whether the exemption applies, it is necessary to determine whether disclosure of the personal affairs information in the documents would be unreasonable. The concept of 'unreasonable

¹ Sections 33(1) and (2).

² Section 33(9).

disclosure' 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 acknowledge the Applicant may know some of the third parties mentioned in the documents. However, even where an applicant claims to know the third parties involved, disclosure of personal affairs information may still be unreasonable.³
20. Also, the exemption in section 33(1) continues to apply to the personal affairs information of a deceased person.⁴
21. I have given particular consideration to the following factors in the circumstances of this matter:
 - (a) The nature of the personal affairs information – The information in the documents relates to information about individuals such as the Applicant's parents, siblings, carers, Agency officers and other third parties. The personal affairs information is recorded in a wardship file. Given the content of the information in the documents and the context in which it was recorded, I am of the view this information is highly sensitive and personal to the Applicant and other persons. This weighs against disclosure.

The information in the documents also relates to the personal affairs information of other clients of the Agency. This information was recorded at or around the same time as the Applicant's details were recorded in the documents. I consider it unreasonable to release this type of information to the Applicant due to the nature of the information and its release would not serve the purpose of the Applicant's request.
 - (b) The extent to which the information is available to the public – I do not consider the information exempted by the Agency in the documents is available to the public. This weighs against disclosure.
 - (c) Whether any public interest would be promoted by release of the information – The Applicant advised they seek access to the information to obtain an understanding of their life and also for legal purposes. Therefore, access would serve a personal and private interest rather than a public interest. While I note the Applicant's genuine personal interest in seeking access to information about their family and siblings, I do not consider there is a public interest in the disclosure of the information such that the public interest would be promoted by release of the personal affairs information of third parties in the documents. This weighs against disclosure.
 - (d) Whether the individuals to whom the information relates object or would be likely to object to the release of the information – The Agency advised it did not consult with the individuals whose personal affairs information had been exempted under section 33(1) as it determined consultation would cause undue suffering, distress and anxiety and it was not otherwise practicable. I support the Agency's decision in this regard. In any case, I am of the view the individuals whose personal affairs information was exempted by the Agency in the documents would be reasonably likely to object to the release of their information to the Applicant. This weighs against disclosure.
 - (e) Whether disclosure of the information would, or would be reasonably like to, endanger the life or physical safety of any person – There is no information before me to suggest this is a relevant factor.
22. In balancing the above factors, I have determined it would be unreasonable to release the personal affairs information to which the Agency has refused access under section 33(1).

³ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁴ Section 33(1).

Section 38

23. The Agency also relies upon section 38 in conjunction with sections 191(1) and 209(1) of the CYF Act.
24. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information contained in the document; and
 - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
25. However, as I have already determined the information exempted by the Agency is exempt under section 33(1), it is not necessary for me to also consider the application of section 38 to the same information.

Deletion of exempt or irrelevant information

26. 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.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁶
28. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete the exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

29. On the information available, I am satisfied it would be unreasonable to release the personal affairs information to which the Agency has refused access under section 33(1).
30. As it is practicable to edit the documents to delete exempt information, I have determined to grant access to the documents in part.
31. As I have already determined the information exempted by the Agency is exempt under section 33(1), it is not necessary for me to also consider the application of section 38 to the same information.

Review rights

32. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁷
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
35. 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.
36. 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.¹⁰

When this decision takes effect

37. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).