

## Notice of Decision and Reasons for Decision

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Applicant:	'AL9'
Agency:	Department of Health and Human Services
Decision Date:	19 September 2019
Exemptions considered:	Sections 25A(5), 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38 under the <i>Freedom of Information Act 1982</i> (Vic) and sections 41, 191 and 209 of the <i>Children, Youth and Families Act 2005</i> (Vic)
Citation	'AL9' and Department of Health and Human Services ( <i>Freedom of Information</i> ) [2019] VICmr 108 (19 September 2019)

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FREEDOM OF INFORMATION – Child Protection documents – refusal to process request on grounds all documents, should they exist, would be exempt – disclosure would prejudice proper administration of the law – prohibited disclosure of confidential information

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 refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(5).

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
19 September 2019

### Reasons for Decision

#### Background to review

1. The Applicant, through their representative, made a request to the Agency for access to the Child Protection records of the Applicant's two children.
2. The Agency refused to grant the Applicant's request under section 25A(5) without searching for or otherwise identifying the documents to which the request relates.

### **Review**

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

### **Child Protection and Child Protection Records**

7. Firstly, I wish to discuss Child Protection and the general nature of Child Protection records in Victoria.
8. The Agency is responsible for enforcing and administering the law relating to Child Protection in Victoria under the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).
9. Child Protection files come into existence when the Agency is notified, or otherwise becomes aware, that a child is at risk of harm, wellbeing or other safety concerns. The CYF Act provides for voluntary reports from a person and mandatory reporting by persons in certain professions specified under the CYF Act.
10. The main functions of Child Protection are to:
  - (a) investigate matters where it is alleged a child is at risk of harm;
  - (b) refer children and family appropriately to services in providing ongoing safety and wellbeing of children;
  - (c) escalate matters to the Children's Court if a child's safety cannot be ensured within the family; and
  - (d) supervise children on legal orders granted by the Children's Court.
11. The Agency publishes the *Child Protection Manual*, which is used by Child Protection practitioners and contains information for families. The manual is available at [www.cpmanual.vic.gov.au](http://www.cpmanual.vic.gov.au).
12. The role and mandate of Child Protection is obviously an important and significant one. It is also comprehensively regulated under the CYF Act.

13. Parliament has determined strict parameters apply to what information can be released in relation to Child Protection matters, including a prohibition on identifying a person who notifies the Agency about any child protection concerns (a **notifier**) and any subsequent Agency investigations into or action taken to address any concerns. The CYF Act also prohibits disclosure of any information likely to lead to the identification of a notifier, except in certain limited circumstances where disclosure is authorised.
14. These prohibitions reflect the strong need for confidentiality around Child Protection notifications and any subsequent inquiries or investigations conducted by the Agency in order to assure notifiers of confidentiality when making sensitive notifications to the Agency in the interests of protecting children from harm or possible harm.
15. This means that when a person, who has been involved with Child Protection, or the parent or guardian of such a child, seeks access to a Child Protection file, the confidentiality provisions that apply to Child Protection information under the CYF Act are strictly applied.

### **Review of exemptions**

16. The Agency determined documents falling within the terms of the Applicant's request would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to any documents, should they exist, in accordance with section 25A(5).
17. The Agency's reasons are set out in its decision letter dated 29 March 2019.

### **Section 25A(5)**

18. Section 25A(5) provides that an agency or Minister may refuse to grant access to documents in accordance with an FOI request without having identified any or all of the documents to which the request relates and without specifying, in respect of each document, the exemptions in the FOI Act under which a document is claimed to be exempt.
19. However, the power under section 25A(5) is carefully circumscribed. A decision maker must be satisfied of three elements that restrict its application to a limited category of cases.
20. In *Knight v Corrections Victoria*,<sup>1</sup> the Supreme Court of Victoria held that section 25A(5) would apply to an FOI request if the following three elements were met:
  - (a) based solely on the description in the request, the decision maker must work out the inherent or essential quality or character of the documents;
  - (b) the decision maker must determine whether the documents, as described by the Applicant, are exempt. It must be apparent that all of the documents would be exempt; and
  - (c) from the face of the request or the Applicant's declared wishes, there must be no scope to provide edited copies of any of the documents.

### *What is the essential character of the documents requested?*

21. As described in their request, the Applicant seeks access to Child Protection documents relating to their children who are under 18 years of age. Such documents, should they exist, would include intake reports, court reports, case notes, risk assessment records and case plan documents.

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338 (per Bell J).

22. In its submission the Agency stated:

The documents described in the terms of the applicant's request are child protection documents. Child protection documents contain confidential information which is obtained both voluntarily and where required by law. Even disclosure of templates would reveal investigation methods, typical sources of information used to verify allegations and processes followed by child protection practitioners.

Notifications are the basis of the department's involvement with children and these details will be paraphrased and referred to many times throughout the child protection records. The types of records likely to fall in scope with the applicant's request would generally include intake and closure records, case notes and other documents detailing child protection's interactions with family members, professionals and/or community members involved with the family (for example, the child's extended family, doctors, or childcare service), as well as analysis and rationales prepared by departmental workers assessing the child's safety and risk. Depending on the outcome of the intake and investigation process, the records could also include documents generated from court proceedings and the placement of a child into alternate care.

The children in this matter are clients of the department and therefore the child protection records is in their name, not in the name of the family or parents.

23. I accept Child Protection records are in the name of the client to whom they relate. The involvement of Child Protection concerns the care provided to a child who is a client of the Agency.

24. Accordingly, I am satisfied the essential quality of the documents, as described in the Applicant's FOI request, should they exist, would be records relating to the Applicant's children and their involvement, if any, with Child Protection.

*Would the documents requested, as described in the FOI request, be exempt?*

25. In refusing access to the requested documents under section 25A(5), the Agency submitted any documents, should they exist, would be exempt under sections 31(1)(a), 33(1), 35(1)(b) and 38. In relation to section 38, the Agency relies upon confidentiality provisions under the CYF Act that relate to Child Protection notifications and investigation documents.

26. In its submission provided during the review, the Agency submitted that, should any documents exist, they would also be exempt under section 31(1)(c).

### **Section 31(1)(a)**

27. Section 31(1)(a) provides a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to, prejudice the investigation of a breach or possible breach of the law, or prejudice the enforcement or proper administration of the law in a particular instance.

28. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>2</sup>

29. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>3</sup>

30. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>4</sup>

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<sup>2</sup> *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

<sup>3</sup> *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

<sup>4</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

31. As part of this review, I have considered whether disclosure would prejudice the Agency's investigations and the 'proper administration of the law' which involves the manner in which the law is administered by the Agency, including regulatory, monitoring and compliance activities in the context of Child Protection investigations conducted under the CYF Act.<sup>5</sup>

32. The Agency submitted the following regarding the impact disclosure of the documents would have on the Agency's investigations:

Disclosure of the documents [should they exist] to the applicant would be reasonably likely to prejudice child protection's investigation of any current or future breaches of the CYF Act relating to the child. If notification or investigation information became known to a person who was responsible for the care of a child, committed a crime against a child, or was in breach of a Child Protection Order or Intervention Order, that person would know the information that the department has obtained. It would make clear what was known to the department and also what evidence may lead to future investigation, or what evidence, if any, has not yet been uncovered or provided to the department. A person could use that information to avoid further child protection involvement. Even seemingly innocuous information could be extremely useful to any person wanting to modify his or her behaviour to prepare an explanation in the event they were investigated due to protective concerns.

33. The Agency submitted the following in relation to the impact disclosure of the documents would have on the Agency's enforcement of or the proper administration of the law:

...the entire child protection process should be viewed as part of the enforcement and administration of the CYF Act, and that release of child protection documents would be reasonably likely to prejudice the department's enforcement or proper administration of the CYF Act in relation to the children.

The child protection process is largely initiated by notifications, without which the department could not fulfil its duty to protect children. Notifications are essential to ensure children at risk are protected and are a fundamental source of information to facilitate the proper administration of the CYF Act. If notification details were disclosed, particularly to the person about whom the notification was made, it is highly likely that people would be reluctant to make notifications in the future. Disclosure of notifier details would have an adverse impact on the department's ability to obtain similar information in future, which would seriously prejudice the department's ability to enforce and administer the CYF Act. As noted above, notification details would be contained throughout the documents sought by the applicant.

Once a notification is made, it triggers a number of processes that are administered and enforced under the CYF Act, such as investigations, assessments, and in some cases, court proceedings to place children at risk of harm in more suitable accommodation. The department submits that it is consistent with the authorities to find that those activities do form part of the administration or enforcement of the law for the purposes of sections 31(1)(a) of the Act...

...

Should certain information be released there is also a risk that methods and processes employed by the department during child protection investigations would be exposed. This would impede the department's ability to properly administer the various obligations and duties imposed pursuant to the CYF Act

34. I am satisfied any documents falling within the terms of the Applicant's request, should they exist, would relate primarily to the Applicant's children, and that any information identifying or concerning other parties would be so entwined with the child's information such that it could not be reasonably distinguished or separated.

35. Accordingly, I am satisfied any documents, should they exist, would relate to the Applicant's children, and would also likely include information about other persons.

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<sup>5</sup> Ibid, *Cichello* at [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 at [28]) and *Croom v Accident Compensation Commission* (1989) 3 VAR 441. Affirmed on appeal: [1991] VicRp 72; [1991] 2 VR 322).

36. The circumstances of Child Protection investigations and proceedings are highly confidential and sensitive. I am satisfied any information obtained by the Agency from, for example, family members or third parties during the course of an investigation, would have been provided with an expectation of strict confidentiality.
37. I acknowledge any documents that would fall within the terms of the Applicant's request, should they exist, would have been prepared in the course of performing and for the purpose of the Agency's statutory functions in administering the Victorian Child Protection Service under the CYF Act. This role includes the type of monitoring and enforcement activities with which section 31(1)(a) is concerned.
38. I also accept disclosure of any documents would be reasonably likely to prejudice the enforcement or proper administration of the Child Protection provisions in the CYF Act.
39. In making my decision, I accept that once protective concerns are raised with the Agency in relation to a child, there is more than a remote chance the Agency will have an ongoing role in relation to that child. However, I also note the exemption does not require the continued involvement by the Agency to be certain or current.
40. I am satisfied any documents meeting the terms of the Applicant's request would contain confidential and sensitive information about the Agency's methods, processes, and sources of information. The disclosure of this material would, in my view, impair the effectiveness of the Agency to administer Child Protection services in the future. This includes the disclosure of the details of any notifiers named in the documents or any information provided in confidence. Disclosure of such information would likely deter notifiers and other third parties from communicating their concerns regarding a child's welfare and safety to the Agency in the future. This would impair the Agency's ability to receive notifications and, accordingly, enforce the relevant laws and maintain effective Child Protection services.
41. For the reasons set out above, I am satisfied any relevant documents would be exempt under section 31(1)(a).
42. Notwithstanding I have found the documents would be exempt under section 31(1)(a), I also consider the exemption under section 38 and its application in conjunction with confidentiality provisions under the CYF Act.

### **Section 38**

43. The Agency relies on section 38 of the FOI Act in conjunction with sections 191 and 209 of the CYF Act. In its submission, the Agency advised it also seeks to rely upon section 41 of the CYF Act.
44. For a document to be exempt under section 38, the following conditions must be satisfied:
  - (a) the CYF Act is an enactment in force, for the purposes of section 38;
  - (b) the documents, as described in the Applicant's request, would contain the specific information prohibited from disclosure by sections 41, 191 and 209 of the CYF Act;
  - (c) the enactment prohibits persons (in this case, agency officers) from disclosing information that would fall within the terms of the Applicant's request; and
  - (d) 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).
45. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

### *Application of the confidentiality provisions*

46. Section 41 of the CYF Act provides:

**41 Identity of reporter or referrer confidential**

(1) If a report is made to the Secretary under section 28 or 29, a person (other than the person who made it) must not disclose to any person other than the Secretary or a community-based child and family service to which the matter is referred under section 30—

- (a) the name of the person who made the report; and
- (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 60 penalty units.

(1A) If a referral is made to a community-based child and family service under section 31 or 32, a person (other than the person who made it) must not disclose to any person other than the Secretary or that community-based child and family service—

- (a) the name of the person who made the referral; and
- (b) any information that is likely to lead to the identification of the person who made the referral.

Penalty: 60 penalty units.

(2) Subsection (1) does not apply if the person who made the report or referral—

- (a) gives written consent to the Secretary; or
- (b) gives written or oral consent to the community-based child and family service.

47. Section 191 of the CYF Act provides:

**191 Confidentiality**

(a) If a report referred to in section 190(1) is made, a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a protective intervener or a community-based child and family service in accordance with subsection (4)—

- (a) the name of the person who made the report; or
- (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 10 penalty units.

(b) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 190.

(c) Subsection (1) does not apply to a disclosure to the Therapeutic Treatment Board of the name or information leading to the identification of a police officer who made a report under section 185.

(d) If a report is made to the Secretary under section 183 or 184, the information referred to in subsection (1) may be disclosed to a community-based child and family service if—

- (a) the Secretary has made a determination under section 187(1)(c) in respect of the report; and
- (b) the matter is referred to the community based child and family service under section 30.

(e) A community-based child and family service to which information referred to in subsection (1) is disclosed must not disclose that information to any other person except in accordance with this Part.

Penalty: 60 penalty units.

48. Section 209 of the CYF Act provides:

**209 Confidentiality**

(1) A protective intervener must not disclose to any person, other than to another protective

intervener or to a person in connection with a court proceeding or to a person in connection with a review by VCAT—

- (a) the name of a person who gave information in confidence to a protective intervener during the course of the investigation of the subject-matter of a protective intervention report; or
- (b) any information that is likely to lead to the identification of a person referred to in paragraph (a)— without the written consent of the person referred to in paragraph (a) or authorisation by the Secretary.

Penalty: 10 penalty units.

- (2) The Secretary may only authorise the disclosure of information to a person under subsection (1) if the Secretary believes on reasonable grounds that the disclosure is necessary to ensure the safety and wellbeing of the child.
- (3) In this section ***court proceeding*** includes a proceeding in the Family Court of Australia.

49. In summary, sections 41, 191 and 209 of the CYF Act prohibit disclosure of the names of persons, as well as any information likely to lead to the identification of any person who:
- (a) provided confidential child protection information to the Agency in the course of a protective intervention investigation; or
  - (b) notified the Agency of their concerns for the wellbeing of a child.
50. Unauthorised disclosure of such information is an offence and carries penalties under the CYF Act. The financial penalty associated with unauthorised disclosure highlights the legislature’s intention that such information should remain protected.
51. I am satisfied the relevant sections of the CYF Act prohibit the disclosure of the identity, or any information likely to lead to the identification of a notifier/reporter or person who gave information in confidence to the Agency during a Child Protection investigation. This includes not only the report or record of confidential information itself, but also any subsequent documents created containing details of the report or confidential information.
52. Accordingly, I am satisfied:
- (a) the CYF Act is an enactment in force, for the purposes of section 38;
  - (b) any documents, as described in the Applicant’s request, would contain the specific information prohibited from disclosure by sections 41, 191 and 209 of the CYF Act;
  - (c) the enactment prohibits persons, in this case Agency officers, from disclosing information that would fall in the terms of the Applicants’ request; and
  - (d) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (absolutely or subject to exceptions or qualifications).
53. As I am satisfied any documents, should they exist, would be exempt under sections 31(1)(a) and 38 in conjunction with sections 41, 191 and 209 of the CYF Act, it is not necessary for me to consider the Agency’s application of sections 31(1)(c), 33(1) and 35(1)(b) to the same information.

***Is there scope to provide an edited copy of the documents requested?***

54. 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.



55. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</sup> 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.<sup>7</sup>
56. In this case, I am satisfied that it would not be practicable to edit any exempt information from the documents, should they exist, for the purpose of disclosing an edited copy of documents to the Applicant as I consider to do so would render the documents meaningless given the nature and content of Child Protection documents, as discussed above.

### **Conclusion**

57. On the information before me, I am satisfied the requirements for the application of section 25A(5) are met.
58. Accordingly, my decision on the Applicant's request is the same as the Agency's decision in that I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(5).
59. Noting the confidentiality provisions that apply to Child Protection documents, as discussed above, I note it would be open to the Applicant to consult with the Agency with a view to exploring the scope of a new FOI request for a narrower range of documents or specific documents that would not attract the application of section 25A(5).

### **Review rights**

60. 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.<sup>8</sup>
61. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
62. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
63. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
64. 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.<sup>11</sup>

### **When this decision takes effect**

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

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<sup>6</sup> *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].

<sup>7</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).