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Notice of Decision and Reasons for Decision

Applicant:	'AM7'
Agency:	Department of Health and Human Services
Decision Date:	20 September 2019
Provision and exemptions considered:	Sections 25A(5), 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38 of the *Freedom of Information Act 1982* (Vic) in conjunction with sections 191 and 209 of the *Children, Youth and Families Act 2005* (Vic)
Citation:	*'AM7' and Department of Health and Human Services (Freedom of Information)* [2019] VICmr 115 (20 September 2019)

FREEDOM OF INFORMATION – Child Protection documents of applicant's child – refusal to process request on grounds all documents would be exempt – prejudice proper administration of the law – prohibited disclosure of confidential information – 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 refuse to grant access to the documents in accordance with the Applicant's FOI request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

20 September 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the Child Protection records relating to their child.

2. The Agency applied section 25A(5) to refuse the Applicant's request in full.

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 considered all communications and submissions received from the parties, including:

   (a) the Agency's decision on the FOI request, dated 12 August 2019;

   (b) the review application received 9 September 2019.

5. 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 section 25A(5) to refuse to grant access to documents

6. 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 documents in accordance with section 25A(5).

7. The reasons for the Agency's decision are set out in its decision letter dated 12 August 2019.

8. Section 25A(5) provides that an agency may refuse to grant access to documents in accordance with an FOI request without having identified any or all of the documents if it is apparent from the nature of the request the documents would be exempt under the FOI Act, and where removal of the exempt material would not facilitate release of the documents, or it is clear the Applicant does not seek an edited copy of the documents.

9. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of the following three elements, which operate to limit its application:

   (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.

   (b) Second, it must be apparent that all of the documents in the request are exempt.

   (c) Third, it must be apparent from:

      (i) The nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or

      (ii) The request or through consultation with the applicant that the person would not wish to have access to an edited copy of a document.[1]

[1] *Knight v Corrections Victoria* [2010] VSC 338.

What is the essential character of the documents requested?

10. The essential quality or character of the documents as described in the Applicant's request are Child Protection records relating to their child.

Would the documents requested, as described by the Applicant, be exempt?

11. In refusing access to the requested documents under section 25A(5), the Agency submitted any documents would be exempt under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b), and section 38 in conjunction with sections 191 and 209 of the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).

12. In its decision, the Agency stated:

    (a) In relation to section 31(1)(a) and (c), relevant legislation in relation to child protection matters protects the identity of a person who makes a report to the agency concerning a child's wellbeing. The exempt information under this section would also include dates on which reports were made, identifying information regarding any person providing information during the investigation of a child protection matter and information that may prejudice the investigation of a child protection matter or a criminal matter.

    (b) In relation to section 33(1), the documents are the personal affairs information of a person other than the Applicant. Protection files are held in the name of the client of the Agency, being the child. While child protection files typically contain personal affairs information of other people, such as relatives, when there are competing rights involving children, the law states that the rights of children should prevail over other interests. The Agency is required to consider whether release is in the best interests of the child, particularly because it is not possible to place restrictions on the distribution of such information.

    (c) In relation to section 35(1)(b), release of information, such as the identify of individuals or information that is capable of identifying and individual, would compromise the Agency's ability to obtain such information in the future, and in turn would jeopardise the Agency's capacity to protect children.

    (d) In relation to section 38, the Agency advises that sections 191(1) and 209(1) of the *Children, Youth and Families Act 2005* (Vic) (CYF Act), prohibits disclosure of the identity of any person who has made a report regarding a child who they believe is in need of protection. These provisions explain that child protection investigations are sensitive and confidential. During an investigation the Agency relies on information gathered from various sources within the community, including clients and their immediate families. These people generally expect the information they provide to the Agency is confidential. The documents, if they exist, would include a report or reports made to the Agency about the Applicant's child's wellbeing and it is essential that the Agency safeguard confidentiality and privacy of people who provided that information.

Section 38 – Documents to which secrecy or confidentiality provisions apply

13. Section 38 provides:

> A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

14. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

15. The Agency relied on section 38 in conjunction with sections 191 and 209 of the CYF Act.

16. Section 191 of the CYF Act provides:

> **191 Confidentiality**
>
> (1) 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.
>
> (2) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 190.
>
> (3) 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.
>
> (4) 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.
>
> (5) 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

17. Section 190(1) of the CYF Act refers to reports made under section 183 (a report to a 'protective intervener' on reasonable grounds that a child is in need of protection), section 184 (a mandatory report to the Secretary on reasonable grounds that a child is in need of protection made by a person in the course of practising his or her profession or carrying out the duties of his or her office, position or employment), reports determined to be a protective intervention report under section 34, and reports under section 185 that a child is in need of therapeutic treatment.

18. 'Protective intervener' is defined in section 181 of the CYF Act as 'the Secretary' [of the Agency] and 'all police officers'.

19. 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.

20. In summary, sections 191 and 209 of the CYF Act prohibit the disclosure of the names of a person who provided Child Protection information to the Agency, as well as any information likely to lead to their identification, except in certain authorised circumstances. Unauthorised disclosure of such information is an offence subject to penalties under the CYF Act, as set out above.

21. The substantial financial penalties associated with these confidentiality provisions highlight Parliament's intention this information be protected and should not be disclosed, except in limited circumstances.

22. I am satisfied sections 191 and 209 of the CYF Act are secrecy provisions to which section 38 of the FOI Act apply for the following reasons:

    (a) the CYF Act is an enactment in force;

    (b) the documents requested by the Applicant would contain the specific information which is prohibited from disclosure by sections 191 and 209 of the CYF Act;

    (c) Agency officers are prohibited from disclosing information that would fall within the terms of the Applicant's request; and

    (d) none of the authorised exceptions for disclosure referred to in sections 191 and 209 of the CYF Act apply to the Applicant's request.

Section 31(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

23. Section 31(1)(a) provides that 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.

24. The phrase 'reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.[2]

25. 'Prejudice' means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.[3]

26. '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.[4]

27. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.

28. The Agency relies on section 31(1)(a) to exempt the documents on grounds their disclosure would prejudice the enforcement or proper administration of the CYF Act.

29. I am satisfied the Agency's enforcement or 'proper administration of the law' includes the manner in which it administers the CYF Act, including undertaking regulatory, monitoring and compliance activities under that Act.[5]

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[2] *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.
[3] Ibid, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].
[4] *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].
[5] *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 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.

30. I am satisfied any documents falling within the terms of the Applicant's request would have been prepared in the course of and for the purpose of the Agency's statutory functions in administering Child Protection services under the CYF Act. This role includes the type of monitoring and enforcement activities with which section 31(1)(a) is concerned.

31. I also accept disclosure of any documents, as described by the Applicant, would be reasonably likely to prejudice the Agency's proper administration of the Child Protection provisions in the CYF Act in relation to the Applicant's child.

32. I acknowledge the Applicant's interests in obtaining Child Protection information about their child. However, the nature and purpose of the Child Protection scheme is of such importance to the protection and welfare of children, that Parliament has determined strict parameters apply to what information can be released in relation to Child Protection matters. This includes the names and identities of those who notify the Agency about child protection concerns and any subsequent Agency investigations into or action taken to address any concerns. Such parameters are set out in, and comprehensively regulated under, the CYF Act.

33. For the reasons set out above, I am satisfied any relevant documents would be exempt under section 31(1)(a).

34. As I am satisfied any documents, should they exist, would be exempt under sections 31(1)(a) and 38, it is not necessary for me to consider the Agency's application of sections 31(1)(c), 33(1) and 35(1)(b).

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

35. Section 25 requires an agency to grant access to an edited copy of a document containing exempt or irrelevant information if it is practicable for the agency or Minister to delete that information, and the applicant agrees to receiving such a copy.

36. It is clear on the face of the communications received from the Applicant that [they are] seeking the documents in their entirety. Even if the Applicant were seeking edited copies, I consider that, because such redactions would be extensive, the documents would be rendered meaningless. Accordingly, I am satisfied there would not be any scope to provide an edited copy of the documents requested.

Conclusion

37. On the information available, I am satisfied the requirements for the application of section 25A(5) are met and the Applicant's request should be refused under section 25A(5).

38. Accordingly, my decision 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).

Review rights

39. 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.[6]

40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.[7]

[6] The Applicant in section 50(1)(b) and the Agency in section 50(3D).
[7] Section 52(5).

41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.[8]

42. 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.

43. 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.[9]

When this decision takes effect

44. 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(9).
[9] Sections 50(3F) and (3FA).