

Notice of Decision and Reasons for Decision

Applicant:	'AT6'
Agency:	Department of Health and Human Services
Decision Date:	28 November 2019
Exemptions and provisions considered:	Sections 25A(5), 31(1)(a) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with sections 41, 191 and 209 of the <i>Children, Youth and Families Act 2005</i> (Vic)
Citation:	'AT6' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 178 (28 November 2019)

FREEDOM OF INFORMATION – Child Protection documents – 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.

I am satisfied the requirements for the application of section 25A(5) are met. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

28 November 2019

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to Child Protection documents. In particular:

By request on an URGENT basis, copies of all documents, file notes, reports and other memoranda, relating to:

1. [Named child], born [date]; and
2. [Applicant], born [date].

Relating to any investigation conducted by the Department of Health and Human Services in relation to the above named persons either individually or together.

2. The Agency refused to grant access to documents, should they exist, in accordance with the Applicant's FOI request under section 25A(5).

Review

3. The Applicant seeks 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) information provided with the Applicant's review application;
 - (c) the Applicant's submission dated 27 November 2019; and
 - (d) the Agency's submission dated 15 November 2019.
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.

Review of section 25A(5) to refuse to grant access to documents

7. The Agency determined any documents falling within the terms of the Applicant's request, should they exist, would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to documents under section 25A(5) without having identified any documents relevant to the Applicant's FOI request.
8. The Agency's reasons for decision are set out in its decision letter dated 10 October 2019.
9. The refusal power under section 25A(5) is 'carefully circumscribed'.¹

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

10. In summary, section 25A(5) provides an agency may refuse an FOI request if it is apparent from the terms of the request that all documents sought would be exempt under the FOI Act, and, if the applicant agrees to receive an edited copy of the documents with exempt information deleted, there is no obligation for the agency to provide the applicant with an edited copy of any document with exempt information deleted under section 25.
11. Further, an agency is not required to identify any or all of the documents to which the request relates and or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.
12. Therefore, I must be satisfied of the following three requirements, 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 from the terms of the request that all documents relevant to the request would be 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.²

What is the essential character of the documents requested?

13. The essential quality or character of the documents, as described in the Applicant's request, would be Child Protection records, including, documents relating to a Child Protection notification and/or investigation.

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

14. In refusing access to the requested documents under section 25A(5), the Agency determined any documents, should they exist, would be exempt under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38 of the FOI Act in conjunction with sections 41, 191 and 209 of the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).
15. In its submission, the Agency stated:

The request made by [legal representative] on behalf of [Applicant] concerns information that would be contained on the Child Protection records of the applicant's [relationship descriptor].

The department was advised by [legal representative] that [Applicant] had received an initial contact letter from DHHS Child Protection, informing [them] that a notification had been received in relation to [their] [relationship descriptor], and that [they] are requested to contact Child Protection to discuss further.

...

² *Knight v Corrections Victoria* [2010] VSC 338.

The documents that would have been captured on the child protection file of the applicant's [relationship descriptor] at this early stage of protective involvement would likely have been limited to the initial notification and intake report, as well as any preliminary correspondence sent to relevant parties to inform them of child protection involvement.

Notification details are the basis of the department's involvement with a given child and mark the beginning of an investigative process that involves gathering information from various sources in order to determine whether the protective concerns contained in the initial notification are substantiated.

Section 38 – Documents to which secrecy or confidentiality provisions apply

16. 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 documents; 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).
17. 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.
18. As stated above, the Agency relies on section 38 in conjunction with sections 41, 191 and 209 of the CYF Act.
19. 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.

20. 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

21. 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.

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

23. 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.

24. In summary, sections 41, 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.
25. The financial penalties associated with these confidentiality provisions highlight Parliament's intention this information be protected and should not be disclosed, except in limited circumstances.
26. I am satisfied sections 41, 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 41, 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 41, 191 and 209 of the CYF Act apply to the Applicant's request.
27. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied any relevant documents would be exempt under section 38 of the FOI Act in conjunction with sections 41, 191 and 209 of the CYF Act.

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

28. 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.
29. The phrase 'reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.³
30. 'Prejudice' means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.⁴

³ *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.

⁴ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

31. '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.⁵
32. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
33. 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.
34. 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.⁶
35. I accept the Agency's submission that 'any documents in existence would have been created as a result of protective concerns being raised for the applicant's child and the investigative process that followed. Therefore, all documents relate to the investigation of a breach or potential breach of the law'.
36. The Agency submits disclosure of the documents would or would be reasonably likely to prejudice its enforcement or proper administration of the law in the following ways:
- Disclosure of the documents 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.
 - Given that the investigation had, at the time of the request, not begun, there is scope for the concerns to be substantiated and for continued child protection involvement.
 - The child protection process is largely initiated by notifications... 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 impact 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 ... notification details would be contained within the documents sought by the applicant.
 - 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.
37. 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 carrying out its Child Protection

⁵ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁶ *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.

functions under the CYF Act. This role includes the type of monitoring and enforcement activities with which section 31(1)(a) is concerned.

38. Given the status of the Agency's investigation, I 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.
39. I acknowledge the Applicant's personal interest in obtaining any Child Protection information about the Applicant and their [relationship descriptor]. 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.
40. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied any relevant documents would also be exempt under section 31(1)(a).

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

41. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
42. During the review, the Applicant's legal representative advised the Applicant agrees to the redaction of any exempt or irrelevant information from the documents.
43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable', and release of an edited copy of a document is not required under section 25.⁸
44. Having considered the nature of the requested documents, I am satisfied deleting all exempt information from the documents would render them meaningless given the substantial amount of information in the documents that would be exempt. Therefore, I am satisfied it would not be practicable to provide an edited copy of the requested documents under section 25.

Conclusion

45. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:
 - (a) the essential quality or character of the documents, as described in the Applicant's request, would be Child Protection records, including, documents relating to a Child Protection notification and/or investigation concerning the Applicant and their [relationship descriptor];
 - (b) given the nature of the requested documents, I am satisfied any relevant documents, should they exist, would be exempt under section 31(1)(a) and section 38 of the FOI Act in conjunction with sections 41, 191 and 209 of the CYF Act; and

⁷ *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].

⁸ *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].

(c) while the Applicant agrees to receive an edited copy of any documents with exempt information deleted, I am satisfied it would not be practicable to provide an edited copy of the requested documents under section 25 as to do so would render them meaningless.

46. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

Application of sections 31(1)(c), 33(1) and 35(1)(b)

47. The Agency also relies on exemptions under sections 31(1)(c), 33(1) and 35(1)(b). However, 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 additional exemptions under sections 31(1)(c), 33(1) and 35(1)(b).

Review rights

48. 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.⁹

49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰

50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹

51. 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.

52. 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.¹²

When this decision takes effect

53. 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.

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).