



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'AY9'
Agency:	Department of Health and Human Services
Decision Date:	30 December 2019
Exemptions 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:	'AY9' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 226 (30 December 2019)

FREEDOM OF INFORMATION – Child Protection Documents – refusal to process an FOI request – 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 section 25A(5) are met. Accordingly, I have refused 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

30 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to Child Protection documents in relation to their child.
2. The Agency refused to grant access to documents, should they exist, in accordance with the Applicant's request under section 25A(5).
3. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request, without having identified any relevant documents if it is apparent from the nature of the request all documents would be exempt under the FOI Act, and where it is not possible to release an edited copy with exempt material deleted, or it is clear the applicant does not seek an edited copy of the documents.
4. 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 relation to section 38, the Agency relied upon confidentiality provisions under the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).
5. The Agency's reasons for decision are set out in its decision letter dated 21 October 2019.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated 21 October 2019;
 - (b) information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 5 December 2019.
9. 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

10. Firstly, I wish to discuss Child Protection and the general nature of Child Protection records in Victoria.
11. The Agency is responsible for enforcing and administering the law relating to Child Protection in Victoria under the CYF Act.
12. 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.

13. 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.
14. 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.cpmmanual.vic.gov.au.
15. The role and mandate of Child Protection is obviously an important and significant one. It is also comprehensively regulated under the CYF Act.
16. 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.
17. 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.
18. 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 section 25A(5) to refuse to grant access to documents

19. 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.
20. The refusal power under section 25A(5) is 'carefully circumscribed'.¹ A decision maker 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.

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

- (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?

21. In its submission the Agency states:

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 (practitioners).

Notification details are the basis of the department's involvement with the child 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 requests 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, doctor or childcare service, police), 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.

The child is the client of the department and therefore, child protections records are in the name of the child they relate to, not in the name of the family or parents.

Regardless of their content, the disclosure of child protection records will enable an applicant to determine that:

- someone was sufficiently concerned about the safety of a child to contact the department (notwithstanding false or spurious notifications);
- a child is a client of the department; and
- the department intends to or has investigated the matters contained in the notification.

22. 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 the child who is a client of the Agency.

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

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

24. As detailed above, 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 relation to section 38, the Agency relied upon confidentiality provisions under the CYF Act that relate to Child Protection notifications and investigation documents.

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

Section 38 – Documents to which secrecy or confidentiality provisions apply

25. 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).
26. 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.
27. As stated above, the Agency relies on section 38 in conjunction with sections 41, 191 and 209 of the CYF Act.
28. In its submission, the Agency states-

Sections 41, 191 and 209 of the CYF Act prohibit any individual from disclosing the identity, or any information likely to lead to the identification of, a notifier/reporter, or person who gave information in confidence to the department during the investigation of the report. 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. The substantial financial penalty associated with these provisions highlights the legislature’s intention that this information should remain protected.

29. 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—
- (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 a 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) Subsections (1) and (1A) do 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.
- (3) To avoid any doubt, the name of a person who made a report or who made a referral may be shared between-

- (a) the Secretary and any community-based child and family service; and
- (b) a community-based child and family service and any other community-based child and family service.

30. 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

31. 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.

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

33. 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 the [Victorian Civil and Administrative Tribunal] 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.

- 34. 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.
- 35. 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.
- 36. I am satisfied the relevant sections of the CYF Act prohibit disclosure of the identity, or any information likely to lead to the identification of the 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.
- 37. Accordingly, I am satisfied:
 - (a) the CYF Act is an enactment in force, for the purposes of section 38;
 - (b) any documents, as described by the Applicant's request, 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.
- 38. 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

- 39. 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.

40. The phrase 'reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.³
41. 'Prejudice' means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.⁴
42. '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
43. As part of this review, I have considered whether disclosure would prejudice the Agency's investigations and the 'proper administration of law' which involves the manner in which the Agency administers the CYF Act, including undertaking regulatory, monitoring and compliance activities under that Act.⁶
44. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
45. I accept the Agency's submission:

...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 may relate to the investigation of a breach or potential breach of the law.

46. The Agency submits disclosure of the documents would or would be reasonably likely to prejudice its investigations 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.
 - As outlined above, the department must be able to properly investigate breaches or possible breaches of the law and administer and enforce the law in regards to child protection cases. Therefore, it is in the best interests of children that the department is able to carry out these obligations.
47. Further, the Agency submits 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 child.

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].

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.

The child protection process is largely initiated by notifications, without which the department could not fulfill 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 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. 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 section 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.

48. I am satisfied any documents falling within the terms of the Applicant's request, should they exist, would relate primarily to the Applicant's child, 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.
49. Accordingly, I am satisfied any documents would relate to the Applicant's child, and would also likely include the information of a number of other parties.
50. The circumstances of Child Protection investigations and proceedings are highly confidential. I am satisfied any information obtained from the Agency from third parties during the course of an investigation would have been provided with an expectation of strict confidentiality.
51. I accept 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 functions under the CYF Act. This role includes the type of monitoring and enforcement activities with which section 31(1)(a) is concerned.
52. 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.
53. I acknowledge the Applicant's personal interest in obtaining any Child Protection information about the Applicant and 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.
54. 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?

55. 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.
56. 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
57. During the review, the Applicant agreed to receive an edited copy of the documents with exempt or irrelevant information deleted from the documents. However, 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. Accordingly, I am satisfied it would not be practicable to provide an edited copy of the requested documents in accordance with section 25.

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

58. 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).

Conclusion

59. 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 relating to the Applicant’s child and their involvement with Child Protection, if any;
 - (b) given the nature of the requested documents, I am satisfied any relevant documents, should they exist, would be exempt under sections 31(1)(a) and 38 of the FOI Act in conjunction with sections 41, 191 and 209 of the CYF Act; and
 - (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.
60. 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).

Review rights

61. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹

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].

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

62. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
63. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
64. 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.
65. 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

66. 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.

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).