

## Notice of Decision and Reasons for Decision

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Applicant:	'BC3'
Agency:	Department of Health and Human Services
Decision Date:	13 February 2020
Exemptions and provisions considered:	Sections 31(1)(a), 33(1) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with sections 41(1), 191(1) and 209(1) of the <i>Children, Youth and Families Act 2005</i> (Vic)
Case Citation:	'BC3' and Department of Health and Human Services ( <i>Freedom of Information</i> ) [2020] VICmr 26 (13 February 2020)

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FREEDOM OF INFORMATION – child protection document – children – personal affairs information relating to children – investigation and assessment – 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 the document requested by the Applicant under the FOI Act.

I am satisfied the document is exempt under sections 31(1)(a), 33(1) and section 38 in conjunction with sections 41(1), 191(1) and 209(1) of the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).

As it is not practicable to delete exempt information in the document in accordance with section 25, I have determined to refuse access to the document in full.

As such, it is not necessary for me to consider the additional exemptions under sections 31(1)(c) and 35(1)(b) the Agency relied on to exempt the same information.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
13 February 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following document:

I submit my freedom of information request in relation to your involvement with my children in [month, year]. Please provide the written record details, DHHS is mandated to record as prescribed by s206, CYFA 2005 [meaning the *Children, Youth and Families Act 2005* (Vic)].

2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to the document 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 been briefed by OVIC staff, who inspected the document, which the Agency exempted under section 31(1).<sup>1</sup>
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application; and
  - (c) the Agency's submission dated 24 January 2020.
7. 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

8. Firstly, I wish to discuss Child Protection and the general nature of Child Protection records in Victoria.
9. The Agency is responsible for enforcing and administering the law relating to Child Protection in Victoria under the CYF Act.
10. Child Protection files come into existence when the Agency is notified, or otherwise becomes aware, a child is at risk to harm, wellbeing or other safety concerns. The CYF Act provides for voluntary reports from a person and mandatory reporting by certain professionals specified under the Act.
11. The main functions of Child Protection are to:
  - (a) investigate matters where it is alleged a child is at risk of harm;

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<sup>1</sup> Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

- (b) refer children and the family to services for the 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.
12. The Agency has published a ‘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).
  13. The role and mandate of Child Protection is obviously an important and significant one. It is also comprehensively regulated under the CYF Act.
  14. 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 notified the Agency about any child protection concerns (**notifiers**) and any subsequent Agency investigations into or action taken to address any concerns.
  15. By way of example, the CYF Act prohibits disclosure of the names of notifiers, as well as any information likely to lead to the identification of a notifier, except in certain limited circumstances where disclosure is authorised. This reflects 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 a child from harm or possible harm.
  16. This means, 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

17. The Agency relied on the exemptions under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38 in conjunction with sections 191(1) and 209(1) of the CYF Act to refuse access to the document. The Agency’s decision letter sets out the reasons for its decision.

### Section 31(1)(a)

18. The Agency exempted the document in full under section 31(1)(a).
19. Section 31(1)(a) provides a document is exempt 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.
20. ‘Reasonably likely’ means there is a real chance of an event occurring; it is not fanciful or remote.<sup>2</sup>
21. ‘Prejudice’ means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>3</sup>
22. ‘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].

23. Section 31(1)(a) may apply in relation to either a specific investigation, or the enforcement or proper administration of the law more generally.
24. 'Proper administration of the law' includes the way the law is administered, including regulatory, monitoring and compliance activities.<sup>5</sup>
25. As part of this review, I have considered whether disclosure would prejudice the Agency's investigations and the 'proper administration of the law', that deals with the manner in which the law is administered, including regulatory, monitoring and compliance activities in the context of Child Protection investigations conducted under the CYF Act.<sup>6</sup>
26. The Agency submitted the following regarding the impact disclosure of the document would have on the Agency's investigations conducted under the CYF Act:

Disclosure of the document to the applicant would be reasonably likely to prejudice Child Protection's investigation of any future breaches of the CYF Act relating to the children. 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.

27. The Agency submitted the following in relation to the impact disclosure of the document 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 administration of the CYF Act, and that release of a child protection document 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...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 administer the CYF Act.

Once a notification is made, it triggers a number of processes that are administered under the CYF Act. The department submits that it is consistent with the authorities to find that child protection investigations 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.

28. The document subject to review was prepared in the course of and for the purpose of the Agency's statutory functions in administering Victorian 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.

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<sup>5</sup> *Cichello v Department of Justice* [2014] VCAT 340 at [23]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] VicRp 72; [1991] 2 VR 322.

<sup>6</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).

29. I am satisfied the document contains confidential 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's ability to administer Child Protection services in the future. This includes the disclosure of notifiers named in the document, any information provided in confidence and any information about the assessments and decisions made Agency officers.
30. I consider 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. I also consider disclosure of the Agency's investigative methods and assessments would be reasonably likely to adversely affect Agency officer's ability to investigate such concerns in the future. This would impair the Agency's ability to enforce the relevant laws and maintain effective Child Protection services.
31. I also consider disclosure of the document would be reasonably likely to prejudice the enforcement or proper administration of the Child Protection provisions in the CYF Act in relation to the Applicant's children, including should the Agency have an ongoing role with the Applicant's children.
32. I accept once protective concerns are raised 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 be certain or current.
33. For the reasons set out above, I am satisfied the document is exempt under section 31(1)(a).
34. I have also considered the application of sections 33(1) and 38 in this matter as follows.

### ***Section 33(1)***

35. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>7</sup> and
  - (b) such disclosure would be 'unreasonable'.
36. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>8</sup>

### ***Does the document contain personal affairs information?***

37. The document contains the full names, contact details and detailed descriptions and personal observations of third parties made by Agency officers.
38. I am satisfied this information constitutes personal affairs information.

### ***Would disclosure be unreasonable in the circumstances?***

39. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a matter.
40. In *Victoria Police v Marke*,<sup>9</sup> the Supreme Court of Victoria Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the

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<sup>7</sup> Sections 33(1) and (2).

<sup>8</sup> Section 33(9).

<sup>9</sup> [2008] VSCA 218 at [76].

exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.

41. The Supreme Court also stated, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.<sup>10</sup>
42. I acknowledge the Applicant may already know the third parties named in the document. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.<sup>11</sup>
43. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.<sup>12</sup>
44. I consider the following factors are relevant in determining whether disclosure of the personal affairs information in the document would be unreasonable in the circumstances:

(a) The nature of the personal affairs information

The personal affairs information relates to the identity of third parties, including the Applicant's children, their [relationship descriptor], and the full name of a child protection practitioner.

It relates to the Agency's Child Protection functions.

I consider the personal affairs information of the children is sensitive, particularly given their age and the scope for ongoing Child Protection involvement by the Agency. I am satisfied the information primarily relates to the Applicant's children, and any information identifying or concerning other parties would be so entwined with the children's information such that it could not be reasonably distinguished or separated.

In my view, the personal affairs information of the children's [relationship descriptor] is sensitive given the circumstances in which this information was obtained by the Agency. These factors weigh against disclosure.

(b) The circumstances in which the information was obtained

The sensitive personal affairs information in the document was obtained by the Agency in the context of exercising its Child Protection functions under the CYF Act. This factor weighs against disclosure.

(c) Whether any public interest would be promoted by release of the information

The Applicant's interest in obtaining the information is a matter of private interest.

I am not satisfied the public interest would be promoted by release of the personal affairs information in the document to the Applicant.

I am of the view there is a broader public interest in the Agency preserving its ability to conduct investigations under the CYF Act in accordance with its Child Protection functions under that Act.

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<sup>10</sup> [2008] VSCA 218 at [79].

<sup>11</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>12</sup> [2008] VSCA 218 at [104].

If such information was to be routinely released under the FOI Act, I am satisfied this would jeopardise the ability of the Agency to investigate and maintain ensure the safety and wellbeing of children and others in accordance with its functions. These factors weigh against disclosure.

- (d) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

The document relates to information obtained by the Agency through the exercise of its functions under the CYF Act. I consider the release of this information would be reasonably likely to cause stress and anxiety to those concerned. This factor weighs against disclosure.

- (e) Whether the individuals to whom the information relates objects, or would be likely to object to the release of the information

There is no information before me to suggest the Agency consulted with the third parties whose personal affairs information is contained in the document. However, given the nature of the sensitive personal affairs information and the circumstances in which it was obtained by the Agency, I am of the view those individuals would be reasonably likely to object to the release of their personal affairs information. This factor weighs against disclosure.

- (f) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person

In deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.<sup>13</sup>

Further, section 33(2AB)(c) states that if the applicant is a 'person who is alleged to pose a risk of committing family violence', I must consider whether disclosure would increase the risk to a primary person's safety from family violence.

Based on the nature of the document, I consider there are reasonable grounds to consider concerns exist about the effect of disclosure of the document on the health and safety of third parties. This factor weighs against disclosure.

45. Given the factors weighing against disclosure, I have determined disclosure of the personal affairs information in the Document would be unreasonable in the circumstances.

46. Accordingly, I have determined the document to be exempt in full under section 33(1).

### ***Section 38 – Documents to which secrecy provisions apply***

47. A document is exempt under section 38 if:

- (a) there is an enactment in force;
- (b) that applies specifically to the kind of information in the document; and
- (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

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

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<sup>13</sup> Section 33(2A).

49. The Agency exempted the document in part under section 38 of the FOI Act, in conjunction with sections 191 and 209 of the CYF Act. For completeness, I will also consider section 41 of the CYF Act, which I consider is relevant to the document.

*Application of the confidentiality provisions in the CYF Act*

50. 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.

...

- (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.

42. 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.

...

Penalty: 60 penalty units.

43. 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.

44 In summary, sections 41(1), 191(1) and 209(1) 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.

45 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.

46 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.

47 Accordingly, I am satisfied:

- (a) the CYF Act is an enactment in force, for the purposes of section 38;
- (b) the document contains specific information prohibited from disclosure under sections 41(1), 191(1) and 209(1) of the CYF Act;
- (c) these provisions prohibit persons, in this case Agency officers, from disclosing that information; and
- (d) the prohibition is absolute, in that disclosure is not subject to any exceptions or qualifications.

### ***Deletion of exempt or irrelevant information***

48 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.

49 Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>14</sup> and the effectiveness of the deletions. Where

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<sup>14</sup> *Mickelburgh 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].

deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.<sup>15</sup>

- 50 I have considered the effect of deleting exempt information from the document in accordance with section 25. In my view, it is not practicable to delete the exempt information as to do so would render the document meaningless.

### **Conclusion**

- 51 On the information before me, I am satisfied the document is exempt under sections 31(1)(a), 33(1) and section 38 in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act.
- 52 As it is not practicable to delete exempt information in the document in accordance with section 25, I have determined to refuse access to the document in full.
- 53 As such, it is not necessary for me to consider the additional exemptions under sections 31(1)(c) and 35(1)(b) the Agency relied on to exempt the same information.

### **Review rights**

- 54 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>16</sup>
- 55 The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>17</sup>
- 56 The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>18</sup>
- 57 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.
- 58 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>19</sup>

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

- 59 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.

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<sup>15</sup> *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].

<sup>16</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>17</sup> Section 52(5).

<sup>18</sup> Section 52(9).

<sup>19</sup> Sections 50(3F) and (3FA).