

Notice of Decision and Reasons for Decision

Applicant:	'BE3'
Agency:	Department of Health and Human Services
Decision Date:	5 March 2020
Provision and exemption considered:	Sections 25A(5), 33(1) 'BE3' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 45 (5 March 2020)
Citation:	

FREEDOM OF INFORMATION – guardianship application – disability client – documents used in evidence – personal affairs information of adult child – parent applicant – refusal to process request on grounds all documents, should they exist, would be exempt – unreasonable disclosure of personal affairs information

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

5 March 2020

Reasons for Decision

Background to review

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

All information and documents related to my [child] [named person] Guardianship used by DHHS Team from [named location] Branch. [Named person] the case manager and [named person] social worker are involved Any documents used as evidence of neglect abuse homelessness and mental illness will be appreciated. Pictures showing we sleep in the car refusal to seek doctors as well not engaging with support and services for [named person]. I would like to request all the evidence gathered and use against me and Information the Department used to all the allegations

2. The Agency refused the Applicant's request in full based on its application of section 25A(5).
3. In denying access to the documents under the provisions of section 25A(5), the Agency determined all documents would be exempt under section 33(1).

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse to process their request.
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 13 November 2019.
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.

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

8. The Agency determined all documents falling within the terms of the Applicant's request would be exempt from release under the FOI Act. Accordingly, the Agency refused to grant access to any documents, should they exist, in accordance with section 25A(5).
9. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request all documents would be exempt under the FOI Act and removal of exempt information from the documents would not facilitate release, or where it is clear the applicant does not seek an edited copy of the documents.

10. The power to refuse a request under section 25A(5) is carefully circumscribed. In *Knight v Corrections Victoria*,¹ the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only where the following three elements are met:
 - (a) based solely on the description in the request, the decision maker must work out the inherent or essential quality or character of the documents;
 - (b) the decision maker must determine whether the documents, as described by the Applicant, are exempt. It must be apparent that all documents are exempt; and
 - (c) from the face of the request or the Applicant's declared wishes, there must be no scope to provide edited copies of any of the documents.
11. Therefore, satisfaction that each of the above elements are met means the application of section 25A(5) will apply to a limited category of cases only.

What is the essential character of the documents requested?

12. It is apparent the essential quality or character of the documents, as described in the Applicant's request, are documents relating to the Applicant's adult child and documents used as supportive evidence by the Agency in a guardianship application.
13. In its submission the Agency states:

The department submits that all documents requested, if they exist, would be contained on [named person's] disability client file and would obviously be [their] personal affairs information.

14. I am satisfied the essential character of the documents, as described in the Applicant's FOI request, should they exist, would be records relating to the Applicant's adult child held by the Agency.

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

15. In refusing access to the requested documents under section 25A(5), the Agency submits any documents, should they exist, would be exempt under section 33(1).

Application of section 33(1)

16. 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;² and
 - (b) such disclosure would be 'unreasonable'.

Would the documents contain personal affairs information?

17. Information relating to the 'personal affairs' of a person includes information that identifies any person or discloses their address or location. It also includes any information from which this information may be reasonably determined.³
18. 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.

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

² Sections 33(1) and (2).

³ Section 33(9).

19. Information that relates to an individual's personal affairs is information that 'concerns or affects that person as an individual'.⁴
20. I am satisfied the requested documents would contain the personal affairs information of individuals other than the Applicant, such as names, addresses, personal relationships and images of the Applicant's adult child and other third parties.
21. I acknowledge that some parts of the documents would also contain information relating to the Applicant's personal affairs. However, I consider this information would be intertwined with the personal affairs information relating to the Applicant's adult child.

Would disclosure involve the unreasonable disclosure of personal affairs information?

22. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy.
23. I acknowledge the Applicant may know some of the third parties mentioned in any documents. However, even where an applicant claims to know the third parties involved, disclosure of personal affairs information may still be unreasonable.⁵
24. I consider the following matters are relevant in the circumstances of this matter:
 - (a) the nature of the personal affairs information, for example, whether it is sensitive or its current relevance;
 - (b) the circumstances in which the information was obtained, for example, whether it was obtained involuntarily or in confidence;
 - (c) the Applicant's interest in the information, including the purpose for seeking access to the documents;
 - (d) whether any public interest would be promoted by releasing the personal affairs information;
 - (e) whether the individuals to whom the information relates object to the release of the information;
 - (f) the likelihood of further disclosure of the information, if released; and
 - (g) whether disclosure of the information would, or would be reasonably like to, endanger the life or physical safety of any person.
25. In summary, I have determined that disclosure of the personal affairs information in the requested documents would be unreasonable for the following reasons:
 - (a) The nature of the information to be disclosed:

The information sought relates to information collected by the Agency for the purpose of making decisions in the best interests of a third party client of the Agency.

⁴ *Hanson v Department of Education & Training* [2007] VCAT 123.

⁵ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

The Agency in its submission states:

The documents requested would consist of highly sensitive material relating to an application to the Tribunal to seek the appointment of a legal guardian for [named person] to ensure [their] access to services and supports as a disability client. The documents may also contain information provided to or obtained by the department in confidence in the course of arranging and providing disability supports and services for [named person].

I am satisfied information in the requested documents, should they exist, would be of a highly sensitive and personal nature. This factor weighs against disclosure.

(b) The circumstances in which the information was obtained:

I note from the submission made by the Agency, that the information in the documents would have been obtained by the Agency in compliance with the Agency's obligations under the *Disability Act 2006* (Vic) and in the context of providing disability support and services to a third party. This factor weighs against disclosure.

(c) The Applicant's interest in the information being disclosed:

In their application for review, the Applicant stated:

.... I would like to request information or evidence in any form that proves dhhs allegations that damage my reputation and was used to take my [child] away. All the allegations are false unfounded and malicious.

It would be highly appreciated if the Commissioner could assist in providing me the information needed to use to the court in order for me to get my [child] back.

I acknowledge the Applicant's personal interest in this matter, given that the documents sought relate to a decision made by the Agency regarding [the Applicant's] adult child. I am of the view releasing the information would further the Applicant's understanding of the decisions made by the Agency. This factor weighs in favour of disclosure.

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

It is not apparent any public interest would be served by release of the information to the Applicant. Given the reasons set out in the Applicant's application for review, access would serve a private interest, rather than a public interest. I am of the view the public interest, in this case, lies in preserving the privacy of the Applicant's adult child or other third parties who would be contained in the relevant documents. This factor weighs against disclosure.

(e) Whether the individuals whose personal affairs information are included in the documents would be likely to object to the release of that information:

The documents would contain significant personal affairs information of the Applicant's child. The documents would also contain personal affairs information of Agency officers, witnesses and informants.

In light of the sensitive nature of the requested documents, and the circumstances in which the Agency would have obtained the information, I am satisfied the Applicant's adult child and any other third parties would be reasonably likely to object to the release of their personal affairs information. This factor weighs against disclosure.

(f) The likelihood of further disclosure of the information, if released:

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the third parties' personal affairs information if released.

Given the Applicant's interest in obtaining access to the requested documents, I am satisfied there is a real likelihood any documents containing the personal affairs information of third parties would be further disseminated. This factor weighs against disclosure.

(g) Whether disclosure of the information would, or would be reasonably like to, endanger the life or physical safety of any person

There is no information before me to suggest this is a relevant factor in this matter.

26. Having considered the above factors, I am satisfied all documents, should any exist, would be exempt under section 33(1).

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

27. 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 to delete that information, and if the applicant is agreeable to receiving such a copy.
28. Determining what is 'practicable' requires consideration of the effort involved in making the deletions 'from a resources point of view',⁶ and the effectiveness of the deletions – that is, whether editing a document would render it meaningless.⁷
29. In this instance, I am not satisfied it would be practicable to provide an edited copy of the requested documents, should any exist. Considering the purpose of the Applicant's request, as specified in their application for review, I am satisfied deletion of exempt information would render any remaining information in the documents meaningless.
30. Accordingly, I am satisfied there is no scope for the Agency to provide access to an edited copy of the requested documents in accordance with section 25.

Conclusion

31. On the information before me, 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).

Review rights

32. 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.⁸
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹

⁶ *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].

⁷ *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].

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

⁹ Section 52(5).

34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
35. 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.
36. 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.¹¹

When this decision takes effect

37. 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(9).

¹¹ Sections 50(3F) and (3FA).