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## Notice of Decision and Reasons for Decision

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Applicant:	'AZ7'
Agency:	Department of Health and Human Services
Decision date:	9 January 2020
Exemptions and provisions considered:	Sections 25A(5), 31(1)(a)
Citation:	'AZ7' and Department of Health and Human Services ( <i>Freedom of Information</i> ) [2020] VICmr 2 (9 January 2020)

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FREEDOM OF INFORMATION – child protection records of applicant's child – records relating to supervised visits – *Children, Youth and Families Act 2005* (Vic)

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.

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

9 January 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - I would like information regarding the supervised contact sessions I am having with my [child].
  - I do not need to know any details about the supervisors or from anyone at DHS.
  - I simply would like some feedback on how my contact sessions have been going. If I can find out if the department is satisfied or if they have identified areas I need to improve upon- This will work towards improving things for my [child] and will be in [their] best interest.
  - Edited or modified versions will be acceptable. This information will not be used as evidence. It is simply to improve my knowledge so that I can improve things for my [child].
2. The Agency decided to refuse the request on the basis that any documents, should they exist, would be exempt under the FOI Act.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Agency submission dated 30 December 2019;
  - (c) the Applicant's review application; and
  - (d) the Applicant's submission dated 17 December 2019.
5. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

### Review of exemptions

6. The Agency relied on section 25A(5) to refuse access to the documents on the basis that any documents, should they exist, would be exempt in full under sections 31(1)(a) and 33(1). The Agency's decision letter sets out the reasons for its decision.

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

7. 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, unless it appears that the applicant would not wish 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.
8. An agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a document would be exempt.

9. For section 25A(5) to apply to a request, 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.<sup>1</sup>
10. I also note that the refusal power under section 25A(5) is ‘carefully circumscribed’.<sup>2</sup>

***What is the essential character of the documents requested?***

11. The essential quality or character of the documents, as described in the Applicant’s request, is that part of a child protection file that relates to their supervised visits with their child. I understand that these records, should they exist, would be notes written by Agency officers regarding the dates, times and locations of the visits and any notes about the visits Agency staff considered appropriate.
12. In this regard, I note the Applicant advised that the reason for their request is that they ‘would like some feedback on how my contact sessions have been going’ and that the disclosure of this information would be in the best interests of their child.
13. I note also that the Applicant advised they are willing to receive edited copies of the documents. I therefore must carefully consider whether, based on the nature of the documents, they could practicably be edited to remove exempt information and retain some meaning for the Applicant.

***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) and 33(1).

***Section 31(1)(a)***

15. Section 31(1)(a) provides:

**31 Law enforcement documents**

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

- (a) 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;

...

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338.

<sup>2</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

16. 'Reasonably likely' means that there is a real chance of an event occurring; it is not fanciful or remote.<sup>3</sup> 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>4</sup> '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>5</sup>
17. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
18. In relation to the application of section 31(1)(a) in this matter, the Agency submitted:

The department is required to comply with a number of statutory obligations either specifically related to children or as part of its broader legislative responsibilities. The most important statutory obligation is the requirement to always put the interests of the child above those of any other party. This is known as the Paramountcy Principle, and forms the basis of the department's responsibilities under [*Children, Youth and Families Act 2005* (Vic)] CYF Act.

The Principle is also enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (The Charter) and requires public authorities to always give priority to the best interests of the children when interpreting legislation or making decisions affecting children. Significantly, The Charter requires, inter alia, public authorities, including OVIC and the VCAT, to consider the best interests of the child, even when a consequence is the nullification of other rights or interests.

...

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.

In relation to the second limb, the department submits that 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.

...

... Disclosure of the documents could create a risk of harm to the child. Child protection information is only disclosed following careful consideration by a qualified practitioner familiar with the particular case. Given the complex nature of child abuse, the motivation for perpetrators to avoid detection, and the fluidity of family relationships, the release of information, even in situations where the information has been previously disclosed to the applicant, would essentially require a review of the child's circumstances.

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<sup>3</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>4</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>5</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

19. The Agency also advised 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'.
20. In their review application and submission, the Applicant advised:

[The] *Children, Youth and Families Act 2005* (Vic)... Chapter 1, section 10, paragraph 3 (b) states that consideration should be given to the need to strengthen, preserve and promote positive relationships between the child and their parents. Chapter 1 section 11 (a) states that a child's parents should be assisted and supported in reaching decisions and taking actions to promote the child's safety and wellbeing. I don't see how refusing to tell me how my contact is going with [my child] is going to be in [their] best interest.

The Department has refused access on the basis that I requested 'law enforcement information'. My argument is that Social workers are not part of a law enforcement Agency. I am not part of any law enforcement investigation...I don't need to know the names or 'investigation methods' of the department if they consider this to be sensitive information. It is in the best interest of my [child] if I am given feedback on how my supervised contacts have gone.

21. I note the Applicant's views; however, the *Children, Youth and Families Act 2005* (Vic) (CYF Act) is an Act to which section 31(1)(a) may apply as it contains laws that are enforceable in Victoria. Further, I am satisfied the Agency's involvement in this matter relates to its enforcement or 'proper administration' of the CYF Act.
22. I therefore must consider whether disclosure would be reasonably likely to prejudice the investigation of a breach of the law or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance.
23. Given the seriousness of the Agency's functions, being the administration of law for the protection of children, I have considered the application of this provision broadly. Further, I accept the expertise of Agency staff when it comes to determining whether the disclosure of child protection records would be reasonably likely to prejudice its ability to enforce child protection law. I particularly note the Agency's view regarding information that may seem innocuous can be used by parties subject to child protection concerns to change their behaviour, which in turn could affect the ability of the Agency to carry out its functions and protect the safety of children.
24. While I note the Applicant has only requested certain documents on their child's file, I accept the Agency's submission, that given the nature of the particular information, release would be reasonably likely to prejudice its ability to enforce or properly administer the CYP Act in the future.

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

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable' and release of the document is not required under section 25.<sup>7</sup>

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<sup>6</sup> *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].

<sup>7</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].

27. While the Applicant is willing to accept an edited copy of the documents, I am of the view it would not be practicable to provide the Applicant with an edited copy of any documents, should they exist, given the nature and content of the documents sought as I am satisfied the deletion of exempt material would render information in the documents meaningless.

### **Conclusion**

28. On the information available, I am satisfied the requirements for the application of section 25A(5) are met.
29. Accordingly, 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 documents in accordance with the Applicant's FOI request under section 25A(5).

### **Review rights**

30. 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>8</sup>
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
33. 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.
34. 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>11</sup>

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

35. 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>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).