

Notice of Decision and Reasons for Decision

Applicant:	'BO3'
Agency:	Department of Health and Human Services
Decision date:	15 May 2020
Exemptions and provisions considered:	Sections 31(1)(c), 33(1), 35(1)(b), and section 38 in conjunction with sections 41(1), 191(1) and 209(1) <i>Children Youth and Families Act 2005</i> (Vic)
Citation:	'BO3' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 137 (15 May 2020)

FREEDOM OF INFORMATION – Child Protection records – notifier information – intake record – secrecy provision – information provided in confidence – personal affairs information – disclosure not unreasonable

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 differs from the Agency's decision in that I have decided to release additional information to the Applicant.

I am satisfied the majority of information in the document is exempt under section 31(1)(c), and section 38 in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act.

However, I am not satisfied certain information in the document is exempt under sections 31(1)(c), 38, 33(1) or 35(1)(b). As I am satisfied it is practicable to delete the exempt information in accordance with section 25, I have determined to grant access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

15 May 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
...a copy of my entire child services file...
2. The Agency identified one document, comprising six pages, falling within the terms of the Applicant's request and refused access to the document in part.
3. The Agency relied on the exemptions in sections 31(1)(c), 33(1), 35(1)(b) and 38 to refuse access to the document. The Agency's decision sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) information communicated to OVIC by the Agency regarding the exempt information.
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 *Children Youth and Families Act 2005* (Vic) (**CYF Act**).
10. Child Protection files come into existence when the Agency is notified, or otherwise becomes aware, a child is at risk of harm or subject to wellbeing or other safety concerns. The CYF Act provides for voluntary reports to be made by any 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;
 - (b) refer children and their family to services for the ongoing safety and wellbeing of the 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.
 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 any 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. For 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

Submissions

17. In its submissions, the Agency advised the following:
 - (a) Child protection documents are sensitive records containing confidential information which is obtained both voluntarily and where required by law. Even disclosure of templates can reveal investigation methods, typical sources of information used to verify allegations and processes followed by Child Protection practitioners (**practitioners**).
 - (b) Notification details recorded in intake reports are the basis of the Agency’s involvement with children and these details will be paraphrased and referred to many times throughout Child Protection records. The Agency has a strict statutory obligation to protect the identities of notifiers.
 - (c) In relation to section 38, this section is relied on in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act, which prohibit disclosure of the identity, or any information likely to lead to the identification of, a notifier, or person who gave information to the Agency in confidence 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.
 - (d) The substantial financial penalty associated with these provisions highlights the legislature’s intention this information should remain protected.

Section 38

18. 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).
19. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
20. 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

21. 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.

22. 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.

...

23. Section 209 of the CYF Act provides:

209 Confidentiality

- (1) A protective intervener must not disclose to any person, other than to another protective intervener or to a person in connection with a court proceeding or to a person in connection with a review by VCAT—
 - (a) the name of a person who gave information in confidence to a protective intervener during the course of the investigation of the subject-matter of a protective intervention report; or
 - (b) any information that is likely to lead to the identification of a person referred to in paragraph (a)— without the written consent of the person referred to in paragraph (a) or authorisation by the Secretary.
- (2) The Secretary may only authorise the disclosure of information to a person under subsection (1) if the Secretary believes on reasonable grounds that the disclosure is necessary to ensure the safety and wellbeing of the child.
- (3) In this section *court proceeding* includes a proceeding in the Family Court of Australia.

24. In summary, sections 41(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) provides 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.

25. 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.

26. 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.

27. Having considered the information before me, 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.

28. Therefore, I am satisfied section 38, in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act, operates to exempt certain information in the document. This also includes recorded dates, as I accept disclosing the date of a Child Protection notification could identify a person or persons who made a notification to the Agency.

Section 31(1)(c)

29. Section 31(1)(c) provides:

31 Law enforcement documents

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

...

(c) disclose or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law.

30. In light of my decision relating to section 38 and my discussion of Child Protection in Victoria, in the circumstances of this case, I am satisfied:

(a) certain deleted information identifies various individuals who, directly or indirectly, provided information to the Agency's Child Protection services in confidential circumstances; and

(b) in relation to the enforcement or administration of the CYF Act.

42 Accordingly, I am satisfied certain information in the document is exempt under section 31(1)(c).

31. However, having been briefed on the content of the exempted information, I consider it contains information that is not exempt under sections 38 and 31(1)(c), as it does not detail confidential information provided by a third party for the purposes of raising concerns as to the wellbeing of a child, nor would disclosure identify a confidential source of information in relation to the enforcement or administration of the law.

32. Therefore, as I am not satisfied this information is exempt under sections 38 or 31(1)(c), I have considered whether sections 33(1) or 35(1)(b) would apply in the circumstances.

Section 33(1)

33. Section 33(1) provides a document is exempt if two conditions are satisfied:

(a) disclosure of the document would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;¹ and

(b) such disclosure would be 'unreasonable'.

34. 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 such information may be reasonably determined.²

35. A third party's opinion or observations about another person's conduct can constitute information in relation to the personal affairs of a third party.³

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

Does the information relate to the 'personal affairs' of a person other than the Applicant?

36. The exempted information contains relationship descriptors and a statement provided to the Agency by a third party.
37. I am satisfied this information would disclose information relating to the personal affairs of a third party.

Would disclosure of the personal affairs information be 'unreasonable' in the circumstances?

38. Considering whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official documents with the protection of the personal privacy of a person other than the Applicant (**third party**). This involves having regard to any matter that may 'relevantly, logically, and probatively' bear upon whether disclosure of personal affairs information of any person would be unreasonable in its own context.⁴
39. The Applicant, in their review application advises access to the document is sought to 'determine the cause for the involvement'.
40. The personal affairs information in the document relates to Child Protections matters. I consider this information to be a sensitive and personal nature.
41. While I consider there is an interest in individuals being able to provide, what is often sensitive information about a person or themselves to the Agency, equally I consider there exists an interest in those subject to Child Protection involvement, no matter the degree, to have a reasonable understanding of such involvement. In the circumstances of this matter, I am satisfied release of the statement would assist the Applicant in understanding the Agency's decision and the outcome of the relevant investigation, without unreasonably disclosing the personal affairs information.
42. Accordingly, I am satisfied disclosure of certain personal affairs information, including a relationship descriptor and general statement in response to a report made to Child Protection, would not be unreasonable in the circumstances.

Section 35(1)(b)

43. Section 35(1)(b) provides:

35 Documents containing material obtained in confidence

- (1) A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister, and—

...

- (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

44. I am satisfied information recorded in the document was communicated to the Agency by a third party with the expectation it would be treated in confidence. However, given the relationship of the third party to the Applicant, and the information was provided in response to a report made, I am of the view release in these specific circumstances would not impair the Agency's ability to obtain similar information in the future.

⁴ Ibid at [98].

45. Accordingly, I am not satisfied this information, being a statement provided in response to a report made to Child Protection is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

46. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
47. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁶
48. I have considered the effect of deleting exempt information from the document in accordance with section 25. I am satisfied it is practicable to delete the exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

49. On the information before me, I am satisfied the majority of information in the document is exempt under section 31(1)(c), and section 38 in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act.
50. However, I am not satisfied certain information in the document is exempt under sections 31(1)(c), 38, 33(1) or 35(1)(b). As I am satisfied it is practicable to delete the exempt information in accordance with section 25, I have determined to grant access to the document in part.
51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

Review rights

52. 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.⁷
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
55. 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.
56. 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.¹⁰

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).

Third party review rights

57. If I decide to disclose a document claimed by an agency to be exempt under sections 33(1) and/or 35(1)(b), if practicable, I must notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.¹¹
58. The document subject to review contains the personal affairs information of a third party.
59. I have decided notifying that person would constitute an unnecessary intrusion for the following reasons:
- (a) the nature and sensitivity of the information in the document;
 - (b) the passage of time since the document was created; and
 - (c) the likelihood a notification would cause undue stress and anxiety to the third party.
60. Accordingly, I am not satisfied it is practicable to notify the third party of their review rights.

When this decision takes effect

61. My decision does not take effect until the Agency's 14 day review period expires.
62. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹¹ Section 49P(5)

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date range]	[Description] Record	6	Refused in part Sections 31(1)(c), 38, 35(1)(b), 33(1)	Release in part Sections 31(1)(c), 38, 25	<p>Sections 31(1)(c) and 38: The CYF Act prohibits the release of information that would lead to the identification of an individual who notified the Agency of a child safety or welfare concern. This is a secrecy provision to which section 38 applies.</p> <p>This exemption also applies to notification dates as it could lead to the identification of a notifier refused under section 31(1)(c).</p> <p>However, I am not satisfied sections 38 and 31(1)(c) apply to a statement made by a third party, in the course of an Agency investigation as it was not provided by the notifier nor is it information provided by a confidential source to the Agency.</p> <p>Section 33(1): I am satisfied it would not be unreasonable to release this statement and the relationship descriptor, as it would provide further insight into the Agency's decisions or the outcome of the investigation.</p> <p>Section 35(1)(b): While the information is confidential in nature, in the circumstances, I am satisfied it would not impair the ability of the Agency to receive information of a similar nature in the future.</p> <p>Section 25: I am satisfied it is practicable to delete the exempt information in accordance with section 25.</p>